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Military Rule of Evidence 707 and the Art of Post-Polygraph Interrogation: A Proposed Amendment to the Blanket Exclusionary Rule

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Introduction

To go beyond is as wrong as to fall short.
–Confucius[1]

In March 1998, Military Rule of Evidence (MRE) 707[2] survived a constitutional challenge in *United States v. Scheffer.*[3] The *Scheffer* opinion limits its focus to whether the rule unconstitutionally prevents an accused from presenting an exculpatory polygraph result.[4] It does not address MRE 707's strict prohibition against any reference to the taking of a polygraph that is offered into evidence for any purpose,[5] and this issue remains ripe for criticism. This article argues for the rescission of MRE 707's blanket exclusion of all references to the taking of a polygraph while leaving intact its prohibitions against admitting polygraph results, opinions of polygraph examiners, and references to offers and refusals to take a polygraph.

The blanket prohibition against any reference to a person taking a polygraph examination unfairly prevents an accused from attacking the reliability of his admissions in a post-polygraph interrogation. The issue is the art of the subsequent interrogation, not polygraph science. Whether in a motion or on the merits, an accused may want to present evidence that he took a polygraph test to demonstrate the overbearing effect of all the relevant circumstances surrounding the interrogation.

Military Rule of Evidence 707 directly conflicts with MRE 304(e)(2),[6] which allows an accused to challenge the weight of an admission or confession already in evidence.[7] The rule also conflicts with MRE 104(a) by imposing a restriction on evidence the military judge may consider in an evidentiary hearing.[8] Military Rule of Evidence 707 should meet the legitimate need for the exclusion of polygraph evidence while avoiding conflict with MREs 304(e) and 104(a). The rule should permit an accused to introduce the facts surrounding his polygraph test as part of the totality of the circumstances inquiry into the voluntariness of his post-polygraph admissions. Once the accused

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1. CONFUCIUS, THE CONFUCIAN ANALECTS (500 BC), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 61 (1992).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 707 (2000) [hereinafter MCM].

> Rule 707. Polygraph Examinations
>
> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Id.

3. 523 U.S. 303 (1998).

4. *Id.* at 305.

5. MCM, *supra* note 2, MIL. R. EVID. 707(a).

6. *Id.* MIL. R. EVID. 304(e)(2).

> Rule 304. Confessions and admissions
>
> (e)(2) *Weight of the evidence*. If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances. When trial is by military judge without members, the military judge shall determine the appropriate amount of weight to give the statement.

Id.

7. Under the definition section of MRE 304(c), confessions are "acknowledgements of guilt." *Id.* MIL. R. EVID. 304(c). Admissions are incriminating statements that tend to show guilt, but fall short of being an express confession to an offense. *Id.*

opens the door by mentioning his polygraph, MRE 707 should allow the government to demonstrate how the circumstances of his polygraph test did not overwhelm the accused's will.

Military judges should apply existing rules to determine the relevancy and probative value of the evidence, and to ensure the parties do not sponsor the results of a polygraph test. Judges should carefully instruct panel members on the limited purpose of such evidence, thereby assisting panel members to make the distinction and follow the law.

This article begins with a fictional scenario demonstrating when the facts surrounding a polygraph exam are probative of the voluntariness of an accused's statement. It then illustrates MRE 707's internal conflict with MREs 304(e) and 104(a). It then examines the decision to model MRE 707 after California Evidence Code section 351.1,[9] and compares MRE 707 to the law of other states. Next, it looks to federal case law and determines that MRE 707 does not follow the majority of federal district courts in accordance with Article 36, Uniform Code of Military Justice (UCMJ).[10] Finally, it studies the drafters' analysis of MRE 707 and concludes that the proposed amendment will maintain the legitimate basis for a polygraph exclusionary rule.

When Might the Fact of a Polygraph Test Be Probative Evidence?

A Scenario

Private (PVT) Jones accuses her drill sergeant, Sergeant First Class (SFC) Smith, of rape, cruelty and maltreatment, and adultery. At the Criminal Investigation Division (CID) headquarters, Special Agent (SA) White escorts SFC Smith to his office where he carefully advises Smith of his rights. Smith states that he understands his rights and signs a waiver.

Smith denies having sexual intercourse with the trainee, but SA White cuts off all of Smith's denials. He falsely tells Smith that CID has gathered several statements from witnesses who all say that SFC Smith constantly made sexual remarks about PVT Jones and always seemed to try to get her separated from her "buddy" and the rest of the platoon.

After forty-five minutes of questioning, the agent has the drill sergeant wait alone in a small, stark, windowless room. A half hour later, SA White resumes questioning SFC Smith in the interrogation room. He says that he is convinced Smith is lying and begins to get angry. He tells Smith that the maximum penalty for rape is the death penalty. He further informs Smith that because Smith's wife is a victim of the adultery, CID has no choice but to tell her about the charges. He says that he will likely ask Mrs. Smith about SFC Smith's whereabouts during the crimes, and if she ever suspected her husband of pursuing any young female trainees. Special Agent White gets more and more hostile. Smith continues to deny any misconduct, and also grows angrier. Smith finally indicates that he would like to leave.

At that moment, SA Brown enters and suggests that everyone calm down. He asks SFC Smith if he wants to go outside for a smoke. Special Agent Brown escorts SFC Smith outdoors by way of the vending machine and offers him a soft drink.

After a smoke and a chat, SA Brown and Smith reenter the interrogation room. A much calmer SA White apologizes for his temper. Special Agent Brown asks everyone to sit down and offers SFC Smith an opportunity to resolve this case–a polygraph test. He explains that the machine is "nearly foolproof," and assures SFC Smith that the polygraph examiner is among the most experienced in the Army. Special Agent White remarks that because of many recent similar allegations against drill sergeants, CID policy requires them to treat all complaints as credible unless evidence indicates otherwise. He explains that if Smith passes the polygraph test, it will "go a long way" in his favor with both CID and his chain of command, and put

8. *Id.* MIL. R. EVID. 104(a).

> Rule 104. Preliminary questions
>
> (a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

Id.

9. *Id.* MIL. R. EVID. 707 analysis, app. 22, at A22-50 (stating the rule's origin in the California Evidence Code).

10. UCMJ art. 36(a) (2000).

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Id.

the focus of the investigation back on the trainee's credibility. Smith agrees to take a polygraph test, and SA White immediately sets it up.

Smith waits in the CID lobby until SA White comes out with another man in civilian clothes. He introduces himself as Mr. King and says that he will be giving the polygraph. He takes SFC Smith back to his office where they sit down and discuss how the polygraph machine works. Mr. King is smiling and relaxed, and he inspires SFC Smith's confidence in the polygraph process. Smith executes another rights warning and a statement of consent to take a polygraph.

Mr. King collects the following biographical data from SFC Smith: where he was born, where he grew up, who raised him, number of brothers and sisters, how long he has been married, his children's names and ages, and similar information. Mr. King is in no hurry. They talk about the Army, fishing, and their plans after retirement.

The test takes place in an adjoining "polygraph" room. After Mr. King gives the test, he leaves the room for a few minutes. He returns with a look of serious concern and tells SFC Smith, "Bob, we've got to have a talk."

Mr. King tells SFC Smith that he has failed the polygraph. He gently explains that he was disappointed to see it, but the results are clear. What's more, King explains, he knew before looking at the charts. With a sympathetic smile and shake of the head, Mr. King tells SFC Smith that he's "just not a good liar."

Smith just stares while Mr. King continues. Mr. King tells him that it is actually a good thing that Smith is a lousy liar. It means that he's basically a good person. After all, King says, "The only people who beat these tests are psychopaths and sociopaths, seriously disturbed people who have no appreciation of right and wrong who therefore reveal no physiological response when they lie."

Smith starts to protest, but Mr. King continues. He says it does not look good. He will have to inform SFC Smith's chain of command that Smith flunked a lie-detector test, and that Smith specifically lied about not having sex with PVT Jones. With these test results, explains Mr. King, the command will have little choice but to court-martial Smith for rape.

Mr. King lists all the implications of going to trial. Since Smith is such a poor liar, no one will believe him and he faces certain conviction. This will disgrace his unit and humiliate his family. He will be reduced to PVT, confined at Fort Leavenworth for many years (particularly because of the stigma attached to a drill sergeant raping a trainee), and receive a dishonorable discharge. He will lose his retirement benefits. His wife and kids will have to visit him in prison, which they may do for a short while before Mrs. Smith divorces him. He will waste away in jail for the best years of his life, unable to support his family financially or to be an example to his children. When Mr. King is finished, SFC Smith sits in a dazed silence.

Mr. King then draws himself close to SFC Smith and puts his hand on Smith's shoulder. He tells SFC Smith that Smith is at a major crossroads in his life. He can continue to deny the offense ("a ridiculous waste of time in light of your charts"), or he can start taking steps to reduce the damage.

Mr. King provides the solution. He says that although the machine indicated deception on the question of whether SFC Smith had intercourse with PVT Jones, the issue of force is subjective. Mr. King says that he is not convinced that this is a rape scenario. There is no physical evidence indicating force. Mr. King suggests that the young, immature PVT Jones must have gotten mad at Smith for something and "cried rape" in revenge. Mr. King chuckles dryly that this has happened before.

Mr. King points out the big difference between rape and adultery. He notes that adultery is more likely disciplined below the court-martial level, usually with an Article 15 or letter of reprimand. It would be embarrassing, but a storm SFC Smith could weather. In either situation, Smith would not lose rank, and with sixteen years of service, he might avoid an administrative separation action and retire with full pension and benefits. Most importantly, Mr. King says, he could call the command and help "smooth things over" by explaining how cooperative SFC Smith has been in this "unfortunate situation."

Smith signs a one-page statement that confesses to one consensual act of sexual intercourse. As Mr. King types the statement for SFC Smith to sign, he asks if PVT Jones had initiated the encounter, commenting that sometimes trainees become infatuated with their drill sergeants. Smith responds that it was possible she was smitten with him, and Mr. King includes that in the statement.

Smith signs the statement and leaves CID. The next week, SFC Smith's commander reads Smith a charge sheet for rape. The trial counsel is confident because the confession establishes the element of vaginal penetration, and PVT Jones will testify about the force element. Since SFC Smith was a drill sergeant, the trial counsel also intends to ask for a "constructive force" instruction.

Discussion

A military judge considering these facts may rule that the admission was voluntary and admissible.[11] There was no physical coercion, and all the interrogative techniques were ostensibly within the bounds of the law.[12] To lessen the evidentiary

11. *See* MCM, *supra* note 2, MIL. R. EVID. 304(e)(1). "*Burden of Proof – In general.* The military judge must find by a preponderance of the evidence that a statement made by the accused was made voluntarily before it may be received into evidence." *Id.*

value the panel gives the statement, SFC Smith will want the members to know what motivated him to make his alleged admission.

In criminal investigations, the polygraph is an integral part of an overall interrogation technique. The polygraph examiner is therefore simply another interrogator, and his goal is to get the suspect to confess. If a suspect indicates deception or gives a result other than "no deception indicated," the examiner will confront the suspect with his results. When the interrogator believes that the suspect is lying, he may get more aggressive in his post-polygraph interrogation.[13] When the examiner's belief is based more upon instinct than fact, the potential exists for a suspect to give a coerced or inaccurate statement against interest.

An innocent suspect might fail a polygraph test and, as a result, find himself subjected to an aggressive police interrogation.[14] In the environment of a post-polygraph interrogation, the possibility exists that an innocent suspect might make an incriminating utterance or sign a statement prepared by police.[15]

Sergeant First Class Smith wants to tell the panel that Mr. King convinced him that no one would believe him after he performed so poorly on the polygraph test, and that he was going to trial for rape unless he admitted to adultery.[16] The fact of the polygraph test is relevant as a circumstance of the interrogation affecting the voluntary nature of SFC Smith's statement.[17] He wants the panel to know all the facts surrounding his statement, and to determine that the statement has little evidentiary value.

With regard to other relevant evidence, the military judge balances the probative value with the risk of unfair prejudice;[18] however, MRE 707 precludes SFC Smith from disclosing the existence of the polygraph test even though he is not seeking to admit the results. Therefore, SFC Smith cannot present the totality of the circumstances of his interrogation. It is like trying to explain why one is surrounded with empty peanut shells without mentioning the elephant sitting in the middle of the room.

The Internal Conflicts

MRE 304 Versus MRE 707

To admit a confession or admission at trial, the prosecution[19] must prove by a preponderance of the evidence[20] that the accused's statement was voluntary and that sufficient corroborating evidence exists.[21] Once the statement is admitted, it is strong evidence against an accused.[22]

---

12. *See id*. MIL. R. EVID. 304(c)(3).

> Rule 304. Confessions and admissions
>
> (c)(3) *Definitions – Involuntary.* A statement is "involuntary" if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

Id. The interrogation techniques in the fiction scenario–deception, false pretenses, minimizing the misconduct while maximizing the consequences, "good cop/bad cop," false claims of scientific evidence, suggestions of possible leniency, and appeals to "do the right thing," have all been upheld as permissible techniques that do not necessarily render a confession involuntary. *See generally* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS chs. 8 and 9 (3d ed. 1986).

13. *Id*. ch. 6.

14. *Id*.

15. The prospect of false confessions seems counterintuitive, but there is significant research indicating that people may admit to wrongful acts they did not commit for a number of reasons. *See generally* Major James R. Agar, II, *The Admissibility of False Confession Expert Testimony,* ARMY LAW., Aug. 1999, at 26. These include compliance with authority, lack of age and experience, low intelligence, and a desperation to escape a stressful environment. *Id.*

16. The polygraph is effective in getting suspects to confess. The test is inherently stressful, and polygraph examiners are generally trained, experienced interrogators. M. G. Goldzband, *The Polygraph and Psychiatrists*, 35 J. FORENSIC SCI. 391, 397 (1990) (describing the process as a "painless third degree"), *cited in Amicus Curiae* brief of the Criminal Justice Legal Foundation in Support of Petitioner, at 10, United States v. Scheffer, 523 U.S. 303 (1998). In field studies, "confessions are most often obtained by polygraphers after a subject has failed the polygraph test." Christopher J. Patrick & William G. Iacono, 76 J. OF APPLIED PSYCHOL., at 229, *cited in Amicus Curiae* brief of the Criminal Justice Legal Foundation in Support of Petitioner, at 10, *Scheffer*, 523 U.S. 303.

17. *See* MCM, *supra* note 2, MIL. R. EVID. 304(e)(2).

18. *Id*. MIL. R. EVID. 403.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id.

19. *Id*. MIL. R. EVID. 304(e).

Military Rule of Evidence 304(e)(2) provides that an accused may attack the voluntariness of his confession or admission at two stages: at a motion to suppress the statement and on the merits.[23] If the motion fails, the accused may present evidence again on the merits before the factfinder to attack the statement's voluntariness.[24] The language is strong: "the military judge *shall* permit the accused to present relevant evidence with respect to voluntariness."[25]

Military Rule of Evidence 707 bans all polygraph references from trial,[26] even if the accused wishes to demonstrate that the polygraph interrogation technique was a major factor in the totality of the circumstances affecting the voluntariness of his statement.[27] Since MRE 707 is in effect "notwithstanding any other provision of law,"[28] it trumps an accused's existing right under MRE 304(e)(2).

MRE 104 Versus MRE 707

Military Rule of Evidence 104(a) states that when considering a preliminary question of admissibility of evidence, a military judge is only bound by the rules of evidence regarding privileges.[29] Therefore, when a judge considers a motion to suppress a statement because of a coercive post-polygraph interrogation, MRE 104(a) permits the judge to consider the circumstances of the polygraph test. Military Rule of Evidence 707, however, states that it applies "notwithstanding any other provision of law."[30] If so, MRE 707 trumps MRE 104 and strips the military judge of some discretion in evidentiary hearings.

The military courts have not resolved the conflict between these rules. In *United States v. Light*,[31] a civilian magistrate considered a failed polygraph result when issuing a warrant to search a soldier's off-post quarters. At court-martial, the defense moved to suppress the results of the search. The Army Court of Criminal Appeals (ACCA) disregarded MRE 707 and ruled that federal case law permitted polygraph evidence in probable cause determinations.[32] The Court of Appeals for the Armed Forces (CAAF) recognized the discrepancy between the authoritative language of MRE 707 and MRE 104(a), but deftly sidestepped the issue by finding adequate independent bases to uphold the warrant, and left the conflict for the President to resolve.[33]

MRE 102

In examining the conflicting rules, one should remain mindful of MRE 102.[34] It states that the evidentiary rules should be

20. MCM, *supra* note 2, R.C.M. 905(c)(1).

21. MCM, *supra* note 2, MIL. R. EVID. 304(g).

22. *See, e.g.*, United States v. Duvall, 47 M.J. 189 (1997).

23. MCM, *supra* note 2, MIL. R. EVID. 304(e)(2). Military Rule of Evidence 304 traces its history to *Jackson v. Denno*, 378 U.S. 368 (1964), where the Supreme Court stated that a defendant has a constitutional right to a fair hearing "in which both the underlying factual issues and the voluntariness of the confession are actually and reliably determined." *Id.* at 380. The Court further defined the process in its 1972 decision *Lego v. Twomey*, 404 U.S. 477 (1972), which expressly allowed the accused to present relevant evidence to the jury to test the weight and voluntariness of a confession that had been ruled admissible. The Court noted that even though the confession was in evidence, a jury might disregard a confession "which is insufficiently corroborated or otherwise deemed unworthy of belief." *Id.* at 485. The military effectively codified the result in *Lego v. Twomey* as MRE 304(e)(2) in the 1984 *Manual for Courts-Martial*. The change brought the military law in line with federal civilian courts. MCM, *supra* note 2, MIL. R. EVID. 304(e) analysis, app. 22, at A22-12.

24. MCM, *supra* note 2, MIL. R. EVID. 304(e)(2).

25. *Id*. (emphasis added).

26. *Id*. MIL. R. EVID. 707.

27. The test for evaluating the voluntariness of an accused's statement is whether, under the totality of the circumstances, the confession or admission "is the product of an essentially free and unconstrained choice by its maker." United States v. Bubonics, 45 M.J. 93, 95 (1996).

28. MCM, *supra* note 2, MIL. R. EVID. 707(a).

29. *Id*. MIL. R. EVID. 104(a).

30. *Id*. MIL. R. EVID. 707.

31. 48 M.J. 187 (1998).

32. *Id*. at 190. The ACCA saw "no basis to depart from federal precedent in this case." *Id*.

33. *Id*. at 191. Since MRE 707 would likely require an amendment to resolve this discrepancy, the President should also consider rescinding the blanket prohibition language to reconcile MRE 707 with MRE 304(e)(2).

34. MCM, *supra* note 2, MIL. R. EVID. 102.

read to ensure fairness to the greatest possible degree, with an eye toward determining the truth and doing justice. The rule specifically urges "promotion of growth and development of the law of evidence."[35]

Military Rule of Evidence 707's blanket exclusion of any reference to the taking of a polygraph test needlessly hinders the court in determining the truth and doing justice. By creating conflict with MREs 304 and 104, MRE 707 does not beneficially develop the law of evidence.

Tracing the Origins of MRE 707

If you like laws and sausages, you should never watch either one being made.

–Otto Von Bismarck[36]

Why Did the Department of Defense Draft an Evidentiary Rule for Polygraphs?

In 1987, the Court of Military Appeals ruled in *United States. v. Gipson*[37] that an exculpatory polygraph test result was not inadmissible *per se*. In an opinion that seemed to anticipate the *Daubert*[38] standard for evaluating scientific evidence, the court concluded that polygraph evidence could be a helpful scientific tool.[39] The court opined that the trial court should have allowed the accused to attempt to lay a foundation to admit his polygraph result.[40] It also outlined how a military judge should evaluate scientific evidence for admissibility.[41]

On 10 March 1988, the Army requested that the Joint Service Committee on Military Justice (JSC) approve a proposal in direct response to *Gipson*.[42] The proposal stated, "The results of *U.S. v. Gipson* . . . should be overturned by either (1) adopting a rule similar to California's . . . or (2) adopting a rule similar to New Mexico's, which sets forth stringent requirements on the qualifications of polygraph examiners, the actual conduct of polygraph examinations, and notice requirements."[43] By December 1989, the JSC had drafted an evidentiary rule making polygraph results inadmissible as a matter of law, and published it for comment in the Federal Register.[44]

The California Rule

Since no federal rule of evidence expressly prohibits polygraph evidence, the drafters looked to the states for guidance. They modeled MRE 707 after California Evidence Code section 351.1.[45]

In 1982, the California legislature addressed the situation the military faced after *Gipson*. The California Court of Appeals had recently decided *Witherspoon v. Superior Court*,[46] holding that it could not justify the longstanding practice of the California courts to exclude polygraph results *per se*. As the Court of

35. *Id*.

36. Attributed widely to Otto Von Bismarck, First Chancellor of the German Empire, 1871-1890, quoted in RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 190 (1989).

37. 24 M.J. 246 (C.M.A. 1987).

38. Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993).

39. *Gipson*, 24 M.J. at 249.

40. *Id*. at 253.

41. *Id*. at 251-52.

42. Interview with Lieutenant Colonel (LTC) Denise R. Lind, Chief, Joint Service Committee Policy Branch, Criminal Law Division, Office of the Judge Advocate General, Rosslyn, Va. (Mar. 2000) [hereinafter Lind Interview].

43. *Id*.

44. *Id*. For further explanation (and criticism) of the process, see Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000).

45. MCM, *supra* note 2, MIL. R. EVID. 707 analysis, app. 22, at A22-50 (stating the rule's origin in the California Evidence Code).

> (a) Notwithstanding any other provision of law, the results of a *polygraph* examination, the opinion of a *polygraph* examiner, or any reference to an offer to take, failure to take, or taking of a *polygraph* examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results. (b) Nothing in this section is intended to exclude from evidence statements made during a *polygraph* examination which are otherwise admissible.

CAL. EVID. CODE § 351.1 (Deering 1999).

46. No. 64290, 1982 Cal. App. LEXIS 1691 (Cal. Ct. App. Jun. 23, 1982).

Military Appeals would later decide in *Gipson*, the *Witherspoon* court determined that parties could lay a foundation for polygraph results.[47]

Defendant Witherspoon was awaiting trial on eight counts of armed robbery.[48] After confessing to the crimes, he passed an exculpatory polygraph examination. He sought to introduce the polygraph for two reasons: (1) to challenge the voluntariness of his initial confession, and (2) to demonstrate his innocence. The trial court denied his motion and refused to hold an evidentiary hearing. Before trial, Witherspoon petitioned the district appellate court for relief.[49]

The appellate court granted the petition, citing California Evidence Code section 351, which stated that all relevant evidence is admissible.[50] The court stated that the California legislature intended to create all evidentiary rules by statute, and that the judiciary would not create rules of evidence.[51]

The *Witherspoon* court sent a clear message to the legislature by stating that the judiciary had no choice but to comply with existing statutory law favoring admissibility.[52] The legislature took up the gauntlet; the *Witherspoon* decision was filed on 23 June 1982, and by 12 July 1983, the governor approved section 351.1 as an "urgency statute."[53]

Section 351.1 prohibited all polygraph results, polygraphers' opinions, and any reference to an offer to take, failure to take, or taking of a polygraph examination unless the parties stipulated.[54] The staff comments to California Senate Bill 266 all focus, however, upon the unreliability of polygraph results.[55] They do not address offers to take polygraphs, failure to take polygraphs, or the blanket prohibition against any mention of a polygraph test.[56] In fact, no records in the legislative history of the bill indicate that California lawmakers considered allowing the reference to a polygraph test to demonstrate the circumstances of interrogation.[57]

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47. *Id*. at *19.

48. *Id*. at *1.

49. *Id*. at *2.

50. CAL. EVID. CODE § 351 (Deering 1999). The code section reflects the Truth in Evidence Act passed by California voters in June 1982. WEINSTEIN ET AL., EVIDENCE: RULES, STATUTES AND CASE SUPPLEMENT 214 (1987) (editorial note). Prior to the *Witherspoon* decision, California voters passed Proposition 8–"The Victims' Bill of Rights." *See In re* Lance W., 694 P.2d 744, 747 (Cal. 1985). In June 1982, it became section 28 to Article I of the California Constitution. Section 28(d) of the amendment provides: "Right to Truth in Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . ." CAL. CONST. art. I, § 28.

51. *Witherspoon*, 1982 Cal. App. LEXIS 1691, at *7-8 (quoting REPORT AND RECOMMENDATIONS OF THE CALIFORNIA LAW REVISION COMMISSION (Jan. 1965)). The report stated:

> As a general rule, the code permits the courts to work toward greater *admissibility* of evidence but does not permit the courts to develop additional *exclusionary* rules. Of course, the code neither limits nor defines the extent of the exclusionary evidence rules contained in the California and United States Constitutions. The meaning and scope of the rules of evidence that are based on constitutional principles will continue to be developed by the courts.

Id.

52. *Id*. at *18.

> We are not unmindful of the fact that the use of the results of polygraph examinations as evidence may pose some procedural problems which will have to be dealt with. Those problems, however, can be resolved by legislation that totally excludes evidence of the results of polygraph examinations or, on the other hand, establishes a procedure that prescribes when and under what circumstances such evidence may be used. Until such legislation is forthcoming, however, it is our opinion that evidence of the results of a polygraph examination can be dealt with under the provisions of the Evidence Code and the procedures, which presently exist, for other types of physical and mental examinations of individuals involved in litigation.

Id.

53. Law of July 12, 1983, ch. 202, 1983 Cal. Stat. 667 (creating CAL. EVID. CODE § 351.1). Section 2 of the law made it effective immediately, stating that it was an urgency statute "necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution." ASSEMBLY COMM. ON CRIMINAL LAW AND PUBLIC SAFETY, STAFF COMMENTS ON S. 266, at 2 (Mar. 16, 1983) [hereinafter STAFF COMMENTS]. The legislation specifically intended to overrule *Witherspoon* and create an exception to the Truth-In-Evidence section of Proposition 8 that bars the exclusion of any relevant evidence. *Id.*

54. CAL. EVID. CODE § 351.

55. STAFF COMMMENTS, *supra* note 53, at 2.

56. *Id*.

The subsequent California case law does not provide any additional insights. The criminal cases applying § 351.1 deal with polygraph results and offers to take a polygraph test, but do not address references to a polygraph test to challenge the voluntariness of an accused's statement.[58]

The Military Chose the California Rule as a Template

The Army's initial proposal to create MRE 707 presented only two options: the California rule or the New Mexico rule (which admitted polygraph evidence subject to tight controls on polygraph tests and their administrators). It is not clear what consideration the drafters gave to other issues and options arising from federal and state case law.[59]

California's rule is not the best source of law. It is a hurried piece of legislation passed in reaction to a case that left open the possibility of admitting polygraph results. There is no evidence that the state's Senate Judiciary Committee considered admitting the fact of a polygraph test for reasons other than the result. There is no indication in the records of the JSC that the drafters of MRE 707 considered this issue, either.[60] By cutting and pasting the California rule, the military drafters similarly limited their focus to polygraph results.

The military reacted to *Gipson* as California reacted to *Witherspoon*. By adopting the California rule (minus the provision allowing parties to stipulate), the military drafters created a broad rule that excludes more than polygraph results.

Comparing California to Other States

Several states prohibit polygraph evidence to prove a test result, but admit it under limited circumstances to demonstrate voluntariness of a statement.[61] These states have determined that polygraph evidence may be admissible to demonstrate circumstances surrounding a confession.

In *State v. Green*,[62] the defendant confessed several times to shooting two teenaged girls. Before his first confession, Green had taken a polygraph examination. After the test, the examiner accused Green of lying, and he tearfully confessed. In several later confessions, Green asserted motives that tended to mitigate his conduct.[63] The prosecution offered the first confession

57. The California State Archives provided the author with the Staff Comments on Senate Bill 266, California Senate Committee on Judiciary and Assembly Committee On Criminal Law and Public Safety, and the Digests of the State Democratic and Republican Caucuses. The State Archives also provided additional correspondence in support and opposition of the bill. None of these materials addressed any issue other than polygraph results. In support of the bill, see, Letters from Allen H. Sumner, Acting Chief, Legislative Affairs Unit of the State of California Department of Justice, to Senator Bill Lockyer (sponsor of Senate Bill No. 266) (Feb. 2, 1983 and Mar. 4, 1983) (on file with author); Letter from Judge Brian D. Crahan, Los Angeles County Municipal Court Judges' Association, to Senator Bill Lockyer (Mar. 1, 1983) (on file with author); Letter from Larry Briskin, Legislative Advocate, California Public Defenders Association, to Senator Bill Lockyer (Mar. 3, 1983) (on file with author); Letter from Marjorie C. Swartz, Deputy State Public Defender, the Office of the State Public Defender, to Senator Bill Lockyer (Mar. 3, 1983) (on file with author); Letters from LeRoy Sana, Executive Director, California Peace Officers' Association, to Senator Bill Lockyer (Mar. 7, 1983 and Mar. 31, 1983) (on file with author); Letter from Michael L. Pinkerton, Legislative Advocate, California Attorneys for Criminal Justice, to Senator Bill Lockyer (Mar. 7, 1983) (on file with author); Letter from Mary Vail, Senior Staff Attorney, the Committee on Human Rights of the State Bar of California, to Senator Bill Lockyer (Apr. 29, 1983) (on file with author); Letter from Frank Zolin, Executive Director, Superior Court Executive Committee, to Assemblyman Bryon Sher (May 2, 1983) (on file with author); Letter from Allen H. Sumner, Acting Chief, Legislative Affairs Unit of the State of California Department of Justice, to Assemblyman Bryon D. Sher, Chairman, Assembly Committee on Criminal Law and Public Safety (June 2, 1983) (on file with author); Letter from Sue U. Malone, Executive Director, California Judges Association, to Senator Bill Lockyer (June 3, 1983) (on file with author); Letter from John T. Studebaker, Principal Deputy Legislative Counsel of California, to Governor George Deukmejian (July 1, 1983) (on file with author). In opposition to the bill, see, Letter from Robert Scarlett, Deputy State Pub. Defender, to Senator Bill Lockyer (Jun. 2, 1983) (favoring admission of an accused's exculpatory polygraph as a right to present a defense, and arguing that polygraph evidence should not be excluded from non-trial proceedings or the penalty phase of a death penalty case) (on file with author). The California legislature does not publish its complete proceedings and debates. *See* HENKE'S CALIFORNIA LAW GUIDE 57 (Daniel W. Martin ed., 3d ed. 1995).

58. People v. Kegler, No. B018744, 1987 Cal. App. LEXIS 2452 (Cal. Ct. App. Nov. 19, 1987) (denying the defendant from impeaching a government eyewitness with his failed polygraph); People v. Espinoza, No. S004728, 1992 Cal. LEXIS 5021 (Cal. Oct. 26, 1992) (arguing unsuccessfully that the defendant's willingness to take a polygraph was a "badge of innocence" and therefore relevant evidence as to his credibility). *See In re* Aonte D., 25 Cal. App. 4th 167 (Cal. App. Dep't Super. Ct. 1994) (affirming that section 351.1 is a rational exercise of the state's power to decide that a category of evidence is not yet sufficiently probative to overcome policy considerations weighing against admissibility).

59. Lind Interview, *supra* note 42.

60. *Id*.

61. *See, e.g.*, Commonwealth v. Bettencourt, 479 N.E.2d 187 (Mass. App. 1985) (finding that trial judge had discretion to prevent the defense from offering the fact of a polygraph because it constituted improper bolstering of credibility); Schaeffer v. State, 457 N.W.2d 194 (Minn. 1990); People v. Madison, 522 N.Y.S.2d 230 (N.Y. App. Div. 1987) ("the use or misuse of such an instrument is a factor to be considered among the totality of the evidence in determining whether or not a confession is the product of coercion"); People v. Tarsia, 405 N.E.2d 188 (N.Y. 1980); People v. Leonard, 397 N.Y.S.2d 386 (N.Y. App. Div. 1977); People v. Wilson, 354 N.Y.S.2d 296 (Misc. 2d 1974); People v. Zimmer, 329 N.Y.S.2d 17 (Misc. 2d 1972) (use of polygraph was a circumstance of interrogation that overbore defendant's will). B*ut see* Johnson v. Florida, 166 So. 2d 798 (Fla. Dist. Ct. App. 1964); Commonwealth v. Corcione, 307 N.E.2d 321 (Mass. 1974) (prosecution prevented from introducing the fact of the polygraph to show consciousness of guilt).

62. 531 P.2d 245 (Ore. 1975).

63. *Id*. at 248.

and presented the polygraph result, arguing that this version was the most credible because the defendant had been confronted with a polygraph result indicating deception.[64]

The trial judge ruled that the state could reveal the fact of the polygraph as an important circumstance surrounding the confession, but the state could not reveal the results. He emphasized that he would not permit "bolstering of the examiner's testimony" by the polygraph results.[65]

Green argued on appeal that if the prosecution presented evidence that Green originally denied the offenses, but changed his story after taking a polygraph test, the jury would know the test result.[66] The Oregon Supreme Court identified the issue as whether the state, during a criminal case, may offer evidence that the defendant took a polygraph test before a confession.[67]

The *Green* court noted that the state had the burden of proving the confession was voluntary, that the details of the examination were a relevant circumstance of the confession, and that relevance must be balanced against unfair prejudice.[68] It decided that when the state raised the issue, the jury would infer that the accused failed the test. Therefore, the government was sponsoring the failed polygraph as *de facto* evidence.[69]

The Oregon Supreme Court reversed the conviction, holding that the danger of unfair prejudice outweighed the probative value of the evidence when the government initially revealed the fact of the polygraph.[70] More significantly, it provided guidance on how courts should treat polygraph evidence under these circumstances, putting the risk entirely in the hands of the defense. The opinion states that when the prosecution lays a foundation for a confession, it may offer evidence that the confession was voluntary, but may not mention a polygraph examination.[71] If the defendant asserts that the confession was not voluntary due to a preceding polygraph, the prosecution could then offer evidence of the existence of the polygraph.[72] The evidence could include the details of the polygraph examination, even if they might reveal the results of the examination, as long as the evidence was relevant on the question of voluntariness.[73]

In *People v. Melock*,[74] the defendant was accused of killing his grandmother.[75] He took a polygraph test that yielded an unreadable result. The detective told the defendant he failed, and the defendant confessed to the crime.[76] The Illinois Supreme Court ruled that even after the judge has considered the issue independently in a motion, a jury could evaluate the voluntariness of a confession.[77] Noting that prior Illinois case law had allowed the state to introduce polygraph evidence to rebut alleged coercion,[78] the court opined that the trial court should have allowed the defendant to introduce the fact of his

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64. *Id.* at 249. These facts included the details of the tests, specific questions and answers in the course of the test, and testimony of the examiner that the accused's reactions to certain questions indicated he was lying. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 251 (noting an issue of first impression for the court).

68. *Id.* at 252-53.

69. *Id.* at 253.

70. *Id.*

71. *Id.* at 254.

72. *Id.*

> In laying the legal foundation for the admissibility of a confession obtained before, during, or after a polygraph examination, a prosecuting attorney is confronted with a task requiring considerable caution. He must seek to avoid any reference by prosecuting witnesses to the results of the polygraph examination or even to the fact of the examination itself . . . . The choice will rest with the defense attorney as to whether or not he wants to inject the polygraph issue into the case for the purpose of attempting to show that it or the technique was a coercive factor which compelled the defendant to confess.

Id. at 253 (quoting JOHN REID & FRED E. INBAU, TRUTH & DECEPTION: THE POLYGRAPH 254 (1966)).

73. *Id.*

74. 599 N.E.2d 941 (Ill. 1992).

75. *Id.* at 943.

76. *Id.* at 952.

77. *Id.* at 960.

polygraph test to show his subsequent confession was involuntary.[79]

In *Murphy v. State*,[80] the defendant moved that the court prevent the prosecution from mentioning his polygraph examination unless he first raised it by attacking the voluntariness of his confession.[81] Employing the same rationale as Oregon did in *Green*, the Maryland Court of Special Appeals ruled that the state could only refer to the fact of a polygraph test after the defendant asserted that the polygraph-assisted interrogation was coercive.[82]

These three cases illustrate how the fact of a polygraph may be an important part of the inquiry into the voluntariness of an accused's statement. Each court resolved the issue of when to allow certain polygraph evidence using well-established rules for determining relevancy and balancing probative value with the risk of unfair prejudice, rather than employing a blanket prohibition. The Oregon and Maryland courts expressly gave the defendant the choice to introduce polygraph evidence for this limited purpose.[83] This approach prevents unfair prejudice to the defendant because the introduction of the evidence is his choice. The government suffers no unfair prejudice because, once the defendant has opened the door, it may argue that the polygraph test and subsequent interrogation brought increased pressure on the defendant's own guilty conscience. The government may also argue that the totality of the circumstances indicates a great deal of moral pressure to confess, but no physical duress or other unfair coercion.

These decisions show that judges can use existing rules to determine relevancy and probative value of polygraph evidence when it is not offered for the truth of its result or otherwise to attack or bolster credibility. By choosing only between California and New Mexico law, the drafters of MRE 707 did not consider the balanced approach taken by Oregon, Illinois, and Maryland.

Contrary to Article 36, UCMJ, MRE 707 Does Not Follow the Majority of Federal Courts

Article 36, UCMJ

The military used state law as its template because there is no federal rule of evidence on polygraphs.[84] The absence of an express federal rule, however, does not mean that the federal district courts have no methodology for dealing with polygraph evidence. The drafters of MRE 707 should have looked to the federal case law for the underlying principles of a new rule rather than adopt the California rule.[85]

Consider the guidance in the UCMJ for promulgating new evidentiary rules. Article 36, UCMJ, authorizes the President to promulgate rules of evidence for military courts "by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[86] To the extent that MRE 707 precludes the "fact of" a polygraph, it does not apply the principles of law generally recognized in the cases decided in federal court cases.

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78. *Id*. at 957-59. In one case, the defendant alleged his confession was coerced by physical violence, and the state was allowed to rebut by showing he confessed shortly after being told he failed a polygraph. *Id.* at 958 (citing People v. Jackson, 556 N.E.2d 619 (Ill. App. Ct. 1990)). In another case, a deputy sheriff testified that the defendant asked for and failed a polygraph prior to his confession. The court ruled that the fact of the polygraph was a relevant circumstance of the voluntariness of the confession, but not the result. *Id*. (citing People v. Triplett, 226 N.E.2d 30, 32 (Ill. 1967)).

79. *Id*. at 949-51. The case describes the circumstances of the interrogation process. The defendant Melock, a twenty-two year-old man with an IQ of 83, was interrogated by Chicago police for three hours in the "good cop-bad cop" style, during which he did not confess. He was then taken to John Reid and Assoc., Inc., for a polygraph exam, where he waited thirty minutes in the waiting room and forty-five minutes in the interrogation room. The defendant then took a one and one-half hour polygraph examination, throughout which he maintained his innocence. During the post-polygraph interview, the examiner told Melock that the defendant had failed the polygraph and was "150% sure" Melock was guilty, even though the test results were "unreadable." *Id.* Melock described going into a dazed "state of shock." *Id.* According to Melock, the "good cop" from earlier in the evening entered, put a hand on the defendant's knee, and said everything would be all right. The defendant stated that that officer asked leading questions, to which Melock grunted "uh-huh, uh-huh." The police transcribed this conversation into a typed statement that Melock signed. The defendant maintained that he was in too much shock to comprehend the questions and just responded automatically. He said that he signed the paper without reading it. *Id*.

80. 659 A.2d 384 (Md. Ct. Spec. App. 1995).

81. *Id*. at 386.

82. *Id*. at 390. *See also* Johnson v. State, 355 A.2d 504, 507 (Md. Ct. Spec. App. 1976) ("[We] are not concerned with the results of a polygraph examination, but rather with the circumstance that it was used as a psychological tool in the interrogation process.").

83. *See supra* notes 72-75, 84 and accompanying text.

84. *See* FED. R. EVID.

85. *See* United States v. Scheffer, 523 U.S. 303, 320 (1998) (Stevens, J., dissenting). Justice Stevens stated that he believed MRE 707 violates Article 36. *Id.* He remarked that he could think of no special military reason to stray from the practices of the federal courts. *Id*. at 429.

86. UCMJ art. 36 (2000).

The law of the federal district courts indicates that the fact of a polygraph test may be relevant in limited circumstances where the danger of unfair prejudice does not outweigh its probative value. Four circuits (District of Columbia, Third, Seventh, and Eighth) allow admission of the fact of a polygraph for the limited purpose of testing the voluntariness of a post-polygraph statement.[87] Four other circuits (Sixth, Ninth, Tenth, and Eleventh) allow polygraph evidence for evaluating voluntariness and for several other reasons other than the results.[88] In these eight circuits, the courts have simply balanced the probative value of the evidence with the risk of unfair prejudice in cases where parties sought to admit polygraph evidence for reasons other than the results.[89]

Examples in the Federal District and Appellate Courts

In *United States v. Little Bear*,[90] the Court of Appeals for the Eighth Circuit found that the "psychological pressure inherent in a polygraph situation"[91] is an important circumstance of the interrogation and necessary for the defense to challenge voluntariness.[92] In *United States v. Jenner*,[93] the Eighth Circuit again found the stressful environment of the polygraph-assisted interrogation "highly relevant."[94]

United States v. Miller[95] concerned a Federal Bureau of Investigation agent's trial for espionage. During the investigation, the defendant submitted to several polygraph tests, which he knew he had failed. While preparing for another test, the new examiner told Miller that the polygraph results would be more accurate if his answers were definite and unequivocal. Before taking the test, Miller admitted that he had given a classified document to a Soviet agent.[96]

The defense moved to exclude any evidence concerning the polygraph exam. The government stated that it intended to introduce the polygraph as a circumstance of Miller's admission if the defendant challenged the voluntariness of his statement. Miller said that he did not intend to challenge voluntariness, but the reliability of the statement. The trial court determined that if Miller chose to challenge his statement in any way, the government could show the circumstances of Miller's interview, including the fact of the polygraph exam.[97] When Miller challenged the reliability of his statements, the

87. Several cases illustrate this proposition. *See, e.g.*, United States v. Johnson, 816 F.2d 918 (3d Cir. 1987) (affirming that the government could introduce the fact of the defendant's polygraph examination to rebut the circumstances of the interrogation alleged by defendant) (noting that the defendant was free to first reveal the fact of the polygraph as a circumstance of the interrogation if it had suited his purposes); United States v. Kampiles, 609 F.2d 1233 (7th Cir. 1979) (allowing the government to introduce the fact of a polygraph to rebut defense allegations of coercion). Tyler v. United States, 193 F.2d 24 (D.C. Cir. 1951) (allowing the prosecution to introduce the fact of a polygraph to demonstrate a confession was not the product of a physical beating, as the defendant alleged) (finding the court instructed the jury that the polygraph result was not evidence of lying, but was good evidence on whether the confession was in fact voluntary); United States v. Zhang, No. 98-425, 1999 U.S. Dist. LEXIS 2904 (D.N.J. Feb. 8, 1999); *see also* United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977) (ruling that the government could initially introduce a reference to the polygraph as a circumstance of the confession when the defendant confessed after refusing to take an polygraph test). The *Kampiles* court noted that the government was not asserting the accuracy of the result and the probative value of the evidence outweighed the danger of unfair prejudice. It put the defendant, however, in the position of either introducing coercive events "contemporaneous with but independent of the polygraph examination," or waiving the issue of voluntariness altogether. *Kampiles*, 609 F.2d at 1245.

88. United States v. Brown, No. 90-10528, 1991 U.S. App. LEXIS 30260 (9th Cir. Dec. 16, 1991) (allowing the prosecution to mention a polygraph test if the defendant challenged voluntariness, even if the defendant never mentions the polygraph in making the challenge). The court ruled that the trial judge must narrowly tailor the government evidence to offset the danger of unfair prejudice. *Id*. at *3. Wolfel v. Holbrook, 823 F.2d 970 (6th Cir. 1987) (holding that under limited circumstances, a reference to a polygraph for reasons other than the test results could be relevant evidence). The court stated that the trial judge had discretion to determine relevance and then balance the probative value against the risk of unfair prejudice. *Id*. at 972. In this case, the defendant wanted to introduce his offer to take a polygraph for the sole purpose of bolstering his credibility, and the Court of Appeals for the Sixth Circuit determined that the trial court properly ruled that the evidence failed the balancing test. *Id*. at 974. *See also* United States v. Tsosie, No. 92-2103, 1993 U.S. App. LEXIS 2500 (10th Cir. Feb. 8, 1993); United States v. Piccinona, 885 F.2d 1529 (11th Cir. 1989) (adopting the Ninth Circuit's view that the trial court should have discretion to admit polygraph evidence for a limited purpose other than the truth of the result if the probative value outweighs the risk of unfair prejudice and waste of time).

89. *See, e.g.*, United States v. Bowen, 857 F.2d 1337 (9th Cir. 1988) (holding that although polygraph results are not admissible evidence, it may be relevant that an exam is given). The court stated that trial judges are to exercise discretion using Federal Rule of Evidence 403 balancing of probative value and prejudicial harm. *Id.* at 1341.

90. 583 F.2d 411 (8th Cir. 1978).

91. *Id*. at 413.

92. *See id*.

93. 982 F.2d 329 (8th Cir. 1993).

94. *Id*. at 334.

95. 874 F.2d 1255 (9th Cir. 1989).

96. *Id*. at 1260.

97. *Id*. at 1260-61.

government presented evidence to the jury that he had taken and failed several polygraphs. This evidence included the specific questions asked during those polygraph tests and Miller's responses.[98] The Court of Appeals for the Ninth Circuit applied a balancing test and determined that the trial court let the prosecution go too far in describing the circumstances of the polygraph test. The court considered the thorough account of the polygraph examination unduly prejudicial, given the limited purpose of the evidence.[99]

In *United States v. Hall*,[100] a bank employee stole money and gave a false description of a fictional robber.[101] When Hall challenged the adequacy of the investigation against him, the government sought to explain that the investigation stopped partly because the defendant had failed three polygraphs.[102] The trial court initially found this fact to be more prejudicial than probative, and would allow the government to present the evidence of three failed polygraphs only if the defendant attacked the adequacy of the investigation.[103]

The defense did exactly that, and the trial court found that the probative value of the polygraph evidence outweighed the danger of unfair prejudice. It accepted polygraph evidence not for the test results, but rather to show that the agents believed that the polygraph results indicated they "had their man." [104]

The federal district courts uniformly forbid admission of polygraph results to prove guilt or innocence, but they do not always forbid parties to refer to polygraph tests. They recognize that sometimes the parties will want to introduce the fact of the test for reasons other than the truth of the result.

In *Little Bear* and *Jenner*, the courts admitted the fact of a polygraph test as an important circumstance of interrogation that was relevant in a challenge to voluntariness.[105] The *Hall* court allowed the parties to refer to a polygraph to challenge or support the adequacy of the police investigation, but not the voluntariness of a statement.[106]

The *Miller* case stands as an example of judicial gatekeeping. It shows that in a challenge to the voluntariness of a post-polygraph statement, the defense controls whether the polygraph test should first be mentioned. Once the defense opens the door, the government may argue all fair inferences, including the possibility that the accused confessed because taking a polygraph test triggered his guilty conscience.[107]

Although this defense strategy is risky, it should be available to a military accused as it is to defendants in other federal courts. Military Rule of Evidence 707 should be amended, therefore, to allow the defense to challenge the voluntariness of a statement by raising the fact of a polygraph test as a circumstance of interrogation. The amendment should permit the government to introduce only the circumstances of the polygraph once the defense reveals the fact of a polygraph exam.

The amendment proposed here is fair to the government and the accused. Because the defense controls the decision to introduce the evidence, the defense assumes the risk of whether the evidence is unfairly prejudicial. The amendment prohibits the government from initial introduction of the evidence. This prevents the government from using the evidence as a sword, which creates a great risk of unfair prejudice; however, once the defense opens the door by mentioning the polygraph test, the government may introduce facts surrounding the polygraph examination as a shield. This would allow the government to argue that the accused made a voluntary statement based upon conscience rather than coercion.

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98. *Id*. at 1261.

99. *Id*. at 1261-62. The court hinted that the result might have been different if the trial judge had limited the amount of evidence that the government introduced and ensured it was narrowly tailored to the purpose of demonstrating voluntariness of the confessions. *Id.*

100. 805 F.2d 1410 (10th Cir. 1986).

101. *Id.* at 1410.

102. *Id*. at 1415.

103. *Id*. The court advised the defense that they "would have to buy the sour with the sweet" if they attacked the investigation. *Id.*

104. *Id.* at 1415-16.

105. United States v Jenner, 982 F.2d 329, 334 (8th Cir. 1993); United States v. Little Bear, 583 F.2d 411, 413 (8th Cir. 1978).

106. *Hall*, 805 F.2d at 1415. This article focuses on admitting the fact of a polygraph test to show the totality of circumstances surrounding an accused's admission. The focus is not on admitting polygraph results to defend or challenge the adequacy of an investigation. The result of a polygraph test and the opinion of a polygraph examiner are inadmissible under the first prong of MRE 707. MCM, *supra* note 2, MIL. R. EVID. 707(a). This article supports the first prong of MRE 707, which is consistent with the majority of federal courts and upheld by the Supreme Court in *United States v. Scheffer*, 523 U.S. 303 (1998). *See supra* notes 86-103 and accompanying text.

107. In such arguments, trial counsel must avoid suggesting that the polygraph results are material evidence. Trial counsel should argue that the accused's confessions were motivated by his own conscience, not by any government coercion.

Military Case Law

Decisions Prior to Gipson

Before deciding *Gipson* in 1987, the military courts generally followed other federal courts. They refused to admit polygraph results, and they weighed the probative value of polygraph evidence against the risk of unfair prejudice. [108]

As early as 1965, a court-martial allowed an accused to disclose the fact that he took a polygraph test to demonstrate the circumstances of his confession. In *United States v. Driver*,[109] the accused raised the issue of the voluntariness of his confession in a motion.[110] On the merits, the trial counsel elicited testimony regarding the polygraph test for the purpose of showing that the confession was voluntary.[111] The Air Force Board of Review affirmed the decision of the trial court, which found that no polygraph result was mentioned, and instructed the panel to consider the test evidence only for determining whether the confession was voluntary, not for the test results.[112]

Twenty years later, the Air Force Court of Military Review held in *United States v. Gaines*[113] that once an accused challenged the voluntariness of a confession made after taking a polygraph, the trial counsel could elicit all relevant facts surrounding the confession.[114] This included the fact that the accused confessed only after being told that his test indicated deception. The military judge gave an appropriate limiting instruction.[115]

United States v. Willis

In *United States v. Willis*,[116] a case decided after MRE 707 was adopted, the accused took a polygraph and subsequently made ambiguous statements that tended to incriminate him.[117] Although the agent who testified about the accused's statements never mentioned the polygraph, the accused argued there was an inference that he had taken and failed a lie-detector test. The CAAF found no such inference in the record.[118]

The accused asserted that he faced the choice of either remaining quiet and allowing the testimony, or raising the issue that he made those statements only after being told that he flunked a polygraph. He was not willing to risk the panel considering the polygraph result for an improper purpose.[119]

The CAAF agreed, musing that such cross-examination "could have surely sunk the defense's ship."[120] The court mentioned, however, that the accused never asked the court to waive MRE 707 with respect to this issue.[121]

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108. *See infra* notes 109-15 and accompanying text.

109. 35 C.M.R. 870 (A.F.B.R. 1965).

110. *Id.* at 874.

111. *Id.* at 875.

112. *Id*. In 1965, the military courts followed the "Massachusetts Rule," under which the members make an independent finding on the admissibility of evidence that has been challenged as involuntary. MCM, *supra* note 2, MIL. R. EVID. 304 analysis, app. 22, at A22-12. The judge instructs the panel not to consider the evidence unless it finds the evidence voluntary beyond a reasonable doubt. This was codified in the 1969 *MCM*. *Id.*

113. 20 M.J. 668 (A.F.C.M.R. 1985).

114. *Id*. at 669.

115. *Id*. The judge told the members:

> (1) they were not to consider evidence about the polygraph on the issue of the [accused's] guilt or innocence, (2) the actual results were inadmissible and should not be considered for any purpose, (3) the fact that the [accused] was told he failed the polygraph should only be considered for the proposition that that is what he was told and they should not speculate as to whether he did [actually] fail it; and (4) they could consider the polygraph evidence which was to be admitted only with regard to the voluntariness of the accused's confession.

Id.

116. 41 M.J. 435 (1995).

117. *Id*. at 438.

118. *Id*.

119. *Id*.

120. *Id*.

121. *Id*.

The waiver language in *Willis* is intriguing. On its face, MRE 707 is neutral.[122] It applies equally to the government and the defense rather than protecting only the accused. In *Willis*, the CAAF implies an accused wanting to challenge voluntariness may ask the military judge for a waiver of the rule barring all mention of the polygraph. This waiver language is significant because it suggests that MRE 707 exists to protect an accused from the government introducing prejudicial polygraph evidence first. When an accused waives the "protection" of MRE 707, he declines to be bound by a rule that does not suit his needs. In this respect, *Willis* appears consistent with *State v. Green*—letting the accused control the introduction of probative polygraph evidence.

The Proposed Rescission is Consistent with Scheffer

United States v. Scheffer[123] may be read consistently with this criticism of MRE 707. *Scheffer* involved admission of an exculpatory polygraph result.[124] The Court ruled that by excluding the polygraph result, MRE 707 does not violate the accused's Sixth Amendment right to present a defense.[125] The Court found the rule to be a rational and proportionate solution to a legitimate governmental interest in ensuring that only reliable evidence is presented in a criminal trial.[126] The President was "within his constitutional prerogative to promulgate a *per se* rule that simply excludes all such [polygraph] evidence."[127]

The parties never raised and the Court never addressed the issue of testing the voluntariness of a confession. Therefore, the Court's analysis in *Scheffer* should not apply when the issue is introduction of polygraph evidence to test the circumstances of interrogation. The Court addressed only the constitutionality of MRE 707 and whether a jury can consider lie-detector results.[128]

In his dissent, Justice Stevens questioned whether the President had the authority to promulgate MRE 707.[129] Like Justice Kennedy (and the three Justices who joined his concurrence),[130] Justice Stevens was wary of a blanket rule of exclusion.[131] He criticized the rule for stripping military judges of the authority that judges in other federal courts enjoy in weighing and admitting probative evidence.[132] Justice Stevens also faulted MRE 707 for assuming that panel members will not follow a judge's instruction on polygraph evidence.[133] He called for a narrower rule tailored to the concerns the government expressed when drafting MRE 707.[134]

Drafters' Analysis of MRE 707

Rescinding the Blanket Prohibition Does Not Conflict with the Drafters' Analysis

The drafters' analysis of MRE 707 addresses the rationale for the *per se* exclusion of polygraph evidence, but does not specifically address why the rule includes the prohibition

122. *See* MCM, *supra* note 2, MIL. R. EVID. 707.

123. 523 U.S. 303 (1998).

124. *Id.*

125. *Id.* at 315-17 (citing Rock v. Arkansas, 483 U.S. 44 (1987); Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967)).

126. *Id.* at 312.

127. *Id*. at 314-15. The Court cited three legitimate governmental concerns prompting the rule. First, polygraph science is unreliable for determining guilt or innocence; second, the jury has the responsibility to determine truth and deception, and the risk that the polygraph's "aura of infallibility" might lead jurors to abandon that function; and third, the *per se* ban avoids repetitive litigation over the collateral issue of polygraph science. *Id.* at 312-15.

128. *Id.* at 312-15. None of the briefs (including the *amicus* briefs) or the oral arguments transcripts address the topic of introducing the "fact of" the polygraph examination as part of the interrogative process. The Criminal Justice Legal Foundation and the State of Connecticut filed *amicus curiae* briefs in support of the government petitioner. Several groups filed briefs in support of the respondent Scheffer: the National Association of Criminal Defense Lawyers, the United States Navy-Marine Corps Appellate Defense Division, the United States Army Defense Appellate Division, the Committee of Concerned Social Scientists, and the American Polygraph Association. *See id*.

129. *Id.* at 322 (Stevens, J., dissenting).

130. Justices O'Connor, Ginsburg, and Breyer joined Justice Kennedy's concurrence criticizing (1) the wisdom of a blanket prohibition on polygraph evidence, and (2) the MRE 707 drafters' belief that panel members will disregard a judge's instructions as to polygraph evidence. *Id.* at 318-20 (Kennedy, J., concurring).

131. *Id*. at 322 (Stevens, J., dissenting).

132. *Id*.

133. *Id*. at 325.

134. *Id*. at 338.

against "any reference to the taking" of a polygraph test.[135] The analysis sets forth its rationale for the *per se* exclusion as follows: (1) danger of misleading court members; (2) danger of preempting the members' judicial function; (3) danger of confusing the issues; (4) waste of time; and (5) more prejudicial than probative.[136] These are valid reasons to prohibit polygraph results, but they are not persuasive rationales for excluding polygraph evidence offered for other reasons.

Admitting the Fact of a Polygraph Will Not Create a "Trial Within a Trial"

The drafters' analysis states that MRE 707 will prevent the "trial within a trial" regarding the validity of the polygraph machine.[137] This article favors prohibiting polygraph results, since they invite diversion into a time-consuming debate of polygraph science and usurp the fact finder's mission. If a military judge admits the fact of a polygraph for the limited purpose of challenging the voluntariness of a post-polygraph statement, however, the result of the polygraph is not material evidence. There is no debate of polygraph science because the result is not an issue.

The Danger of Misleading or Preempting the Court Members Is Low

The drafters have stated that "to the extent that the [panel] members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' 'traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence' will be preempted."[138]

If a judge tells panel members that they may not consider the result of a polygraph, but should consider the circumstances of the interrogation to determine how much weight to give the statement, one should assume (as in all other cases) that the panel members can and will follow that order.[139] There is nothing special about polygraph evidence that will entice panel members to abandon their duty to follow the judge's instructions and apply the law.[140] Since the origins of the hearsay rule, jurors have evaluated evidence offered for reasons other than the truth of the matter asserted.[141]

Reference to the Fact of a Polygraph May Be More Probative than Prejudicial

When an accused makes an admission in a post-polygraph interview, the polygraph exam is relevant because it is a vital part of the interrogation process. Under the amendment proposed here, the evidence is more probative than prejudicial because the accused assumes the risk of unfair prejudice.[142] If the accused chooses to mention his polygraph, then he is satisfied that the panel will abide by the military judge's limiting instruction.[143]

The drafters of MRE 707 apparently developed such a broad prohibition against polygraph evidence to protect the best interests of the accused.[144] If so, the wholesale exclusion of any reference to the fact of a polygraph test is overly paternalistic. In all other instances, we allow the judge to act as a gatekeeper by limiting what is presented and giving proper instructions on the presented evidence.

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135. MCM, *supra* note 2, MIL. R. EVID. 707 analysis, app. 22, at A22-50.

136. *Id*.

137. *Id*.

138. *Id*. (quoting United States v. Alexander, 526 F.2d 161, 168-69 (8th Cir. 1975)).

139. Military panels are specially selected using criteria under UCMJ Article 25(d)(2) (listing criteria of age, education, training, experience, length of service, and judicial temperament). UCMJ art. 25(d)(2) (2000). The criteria are objective and produce the most experienced, educated, and mature jurors. *See id.*

140. "It may be urged that the commitment of our system to jury trial presupposes the acceptance of the assumptions that the jury follows its instructions, that it will make a separate determination of the voluntariness issue, and that it will disregard what it is supposed to disregard." Bernard D. Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury,* 21 U. CHI. L. REV. 317, 327 (1954), *cited in* Jackson v. Denno, 378 U.S. 368, 382 (1964).

141. *See* MCM, *supra* note 2, MIL. R. EVID. 801.

142. The risk is that the panel will behave lawlessly and disregard the judge's instruction. If the accused knowingly assumes the risk that the jury will disregard the judge's instruction, there is no appreciable issue of ineffective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668, 691 (1984). In a motion *in limine* to discuss the parameters of the evidence, the accused should state on the record that he understands the risk of prejudice.

143. The government might argue that if the judge instructs the panel members that the polygraph result is inadmissible, the panel might suspect that the polygraph examiner lied to the accused about the result. The answer is that the defense cannot be permitted to argue or even imply that the agent lied. The focus is the interrogation *technique*, not the result.

144. *See* MCM, *supra* note 2, MIL. R. EVID. 707 analysis, app. 22, at A22-50.

Conclusion: Rescind MRE 707's Blanket Prohibition on Reference to the Fact of a Polygraph Test

What Should Change

Military Rule of Evidence 707 is a useful rule that seeks to achieve fairness and judicial economy, but it is only partially successful because it does too much. The military should rescind the language in MRE 707 prohibiting all references to a polygraph test.

When the CAAF in *United States v. Light* called upon the military to clarify MRE 707's conflict with MRE 104(a), it created an occasion to eliminate MRE 707's blanket exclusion of all references to a polygraph test.[145] The rule's blanket exclusion should be eliminated because it conflicts with MRE 304(e)(2) by limiting the ability of the accused to present relevant evidence of the circumstances surrounding his admission. This blanket exclusion unfairly prejudices the accused's ability to present an accurate picture of his post-polygraph interrogation. Military judges can use existing rules for determining relevance, continue to balance probative value with prejudice, and issue meaningful instructions to the members.

Although Article 36, UCMJ, directs that new evidentiary rules will follow the majority of federal district courts,[146] MRE 707's blanket exclusionary rule does not match the case law of the federal courts. Instead, it follows California legislation that was quickly drafted in response to a specific case.[147] The legislative history of California Evidence Code section 351.1 and the drafters' analysis of MRE 707 each fail to address the issue of admitting polygraph tests for reasons other than their results.[148]

What Should Not Change

The rest of MRE 707 should remain unchanged. Removing only the blanket prohibition will keep the best parts of the rule, resolve the inconsistencies, and improve overall fairness. The current rule properly prohibits polygraph results and polygraph examiner opinions[149] because the panel members should be the arbiters of truth and deception, not a machine whose science enjoys no consensus in the scientific community.[150] The current rule also properly precludes references to offers or refusals to take polygraph tests.[151] Offering to take a polygraph may indicate consciousness of innocence, but it may also be a self-serving ploy or a desperate attempt to "beat the box." Likewise, one's refusal to take a polygraph may stem from consciousness of guilt or mistrust in the machine or police. Finally, commenting on an accused's failure to answer questions in a polygraph test may violate his right to remain silent.[152]

The Solution

Military judges should follow Oregon's solution in *State v. Green*,[153] which is consistent with the treatment of polygraph evidence in the federal courts.[154] It allows an accused to initially introduce the circumstances of his polygraph examination for the limited purpose of testing the voluntariness of his post-polygraph admissions.[155] If the accused chooses to introduce the fact of his polygraph, the government may then show that the circumstances of the interrogation indicate permissible psychological pressure rather than impermissible physical coercion. The government may not in any way vouch for the results of the polygraph test, but may argue that the totality of the circumstances paint a clear picture of the accused's confrontation with his own guilty conscience.[156] The military judge should instruct the panel members that the polygraph result is not evidence, but the existence of the polygraph test is relevant for a

145. *See supra* notes 31-33 and accompanying text.

146. UCMJ art. 36 (2000).

147. *See supra* notes 46-58 and accompanying text.

148. *See supra* notes 43-62 and accompanying text.

149. *See* MCM, *supra* note 2, MIL. R. EVID. 707.

150. *Id.* analysis, app. 22, at A22-50.

151. *Id.*

152. *See* MCM, *supra* note 2, MIL. R. EVID. 304(h)(3).

153. 531 P.2d 245, 254 (Ore. 1975). *See supra* notes 64-73 and accompanying text.

154. *See supra* notes 89-109 and accompanying text.

155. *See Green*, 531 P.2d at 254.

156. *See id*.

limited purpose as one of the circumstances affecting the voluntariness of the accused's statement.

This solution is fair to both the accused and the government. It demonstrates trust in military judges and panels to evaluate relevant evidence. If amended, MRE 707 would continue to prevent parties from introducing an offer or refusal to take a polygraph exam to establish or attack credibility. It would also continue to serve its desired purpose—eliminating the misleading, confusing, and resource-intensive process of litigating the admission of polygraph results.

The Military's Psychotherapist-Patient Privilege: Benefit or Bane for Military Accused?

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Introduction

In 1999, the Military Rules of Evidence (MRE) were amended to create a new psychotherapist-patient privilege.[1] The new privilege, contained in MRE 513,[2] was designed to protect conversations with psychiatrists, psychologists, and other mental health professionals.[3] The military developed this privilege in response to a 1996 decision by the Supreme Court[4] that recognized a similar privilege in the federal district courts, and highlighted the nearly universal acceptance of a psychotherapist-patient privilege in other jurisdictions in the United States.[5]

The new military privilege protects statements made by soldiers accused of crimes, and also statements by military and civilian victims and witnesses.[6] The privilege contains many exceptions,[7] which make it difficult for accused soldiers to take advantage of its protections. In contrast, the privilege can prevent defense attorneys from discovering or using statements made by victims and witnesses who may testify against their clients.

This article discusses the origins and purposes of the new privilege and analyzes its effects. It examines the rule from the standpoint of the military defense counsel, focusing on the dangers involved when accused soldiers talk to psychotherapists and the difficulties the privilege can pose when defense counsel attempt to obtain statements from victims and witnesses.

Development of the Psychotherapist-Patient Privilege in Federal Court

When the Federal Rules of Evidence (FRE) were proposed in 1971, they contained a number of specific privileges, including a psychotherapist-patient privilege. The drafting committee recognized the importance of protecting the relationship between psychotherapists and patients. The committee stressed that psychotherapists must obtain patients' trust to diagnose their problems and treat them properly.[8]

Congress was unable to reach a consensus on what privileges the new FRE should include.[9] When Congress adopted the FRE, it did not include the psychotherapist-patient privilege, or any of the other specific privileges.[10] Instead, Congress promulgated FRE 501, which recognizes federal common law as the source for privileges under the new rules.[11] Congress left recognition of privileges up to the federal courts to decide on a case-by-case basis.

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1. Exec. Order No. 13,140, 64 Fed. Reg. 196 (Oct. 12, 1999).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513 (2000) [hereinafter MCM].

3. *See id*. analysis, app. 22, at A22-24.

4. Jaffee v. Redmond, 518 U.S. 1 (1996).

5. *See* MCM, *supra* note 2, MIL. R. EVID. 513 analysis, app. 22, at A22-24.

6. *Id.* MIL. R. EVID. 513(a) (the rule applies to "patients").

7. *Id.* MIL. R. EVID. 513(d).

8. Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 240-44 (1972).

9. *See* STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 691-92 (7th ed. 1998).

10. *See* FED R. EVID.

11. FED. R. EVID. 501. The rule provides, in pertinent part:

> [E]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Id.

Several federal appeals courts responded by creating some form of psychotherapist-patient privilege. The Court of Appeals for the Sixth Circuit recognized the privilege in 1983;[12] the Second Circuit followed suit in 1992;[13] the Tenth Circuit recognized the privilege in 1994, but limited its application;[14] and the Seventh Circuit recognized the privilege in 1995.[15] Other federal appeals courts declined to recognize a psychotherapist-patient privilege.[16]

In 1996, the Supreme Court resolved the split among the circuits. In *Jaffee v. Redmond*,[17] the Court recognized a psychotherapist-patient privilege under federal common law, using the authority provided by FRE 501.[18] The Court found that all fifty states recognized some form of a psychotherapist-patient privilege.[19] The Court distinguished a general physician-patient privilege by noting that physicians can successfully diagnose and treat patients based upon physical exams, whereas psychotherapists must obtain their patients' trust for successful diagnosis and treatment.[20]

Development of the Psychotherapist-Patient Privilege in the Military

The MRE adopted in 1980 contained a list of specific privileges.[21] Unlike the federal district courts, the military felt it needed specific guidance because the military justice system involves many non-lawyers, such as commanders and investigating officers.[22]

The list of privileges did not include a psychotherapist-patient privilege, and specifically rejected the more general physician-patient privilege.[23] The MRE did include a provision that permitted the courts to discover new privileges based upon federal common law.[24] In *United States v. Toledo*,[25] however, the Court of Military Appeals declined to recognize a common law psychotherapist-patient privilege.[26]

After the Supreme Court's ruling in *Jaffee v. Redmond*, the military courts addressed whether the new federal common law psychotherapist-patient privilege applied to the military. Initially, the Army Court of Criminal Appeals (ACCA) suggested that it might.[27] In 1997, however, the Court of Appeals for the Armed Forces (CAAF) stated in dicta that the common law privilege did not apply to the military.[28] After the adoption of

12. *In re* Zungia, 714 F.2d 632 (6th Cir. 1983).

13. *In re* Doe, 964 F.2d 1325 (2d Cir. 1992).

14. United States v. Burtrum, 17 F.3d 1299 (10th Cir. 1995).

15. Jaffee v. Redmond, 51 F.3d 1346 (7th Cir. 1995), *aff'd*, 518 U.S. 1 (1996).

16. *See* United States v. Meagher, 531 F.2d 752 (5th Cir. 1976); *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983).

17. 518 U.S. 1 (1996).

18. *Id.* at 15.

19. *Id.* at 12.

20. *Id.* at 10.

21. *See* MCM, *supra* note 2, MIL. R. EVID. 501-509 analysis, app. 22, at A22-37 - 43.

22. *Id.* MIL. R. EVID. 513 analysis, app. 22, at A22-38.

23. *Id.* MIL. R. EVID. 501(d). "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." *Id.*

24. *Id.* MIL. R. EVID. 501(a). The rule states:

> A person may not claim a privilege with respect to any matter except as required by or provided for in (1) the Constitution of the United States as applied to members of the armed forces; (2) An Act of Congress applicable to trials by courts-martial; (3) These rules or this Manual; or (4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

Id.

25. 25 M.J. 270 (C.M.A. 1987).

26. *See id.* at 275-76.

MRE 513 in 1999, the CAAF confirmed its earlier dicta, holding that statements to psychotherapists made before the effective date of the new rule were not protected by either a common law privilege or a retroactive application of the new rule.[29]

Military Rule of Evidence 513

Military Rule of Evidence 513 applies to all statements made after 1 November 1999.[30] The rule creates a psychotherapist-patient privilege for investigations and proceedings under the Uniform Code of Military Justice (UCMJ).[31] The drafters adopted the rule because of the military's policy of following the FRE when they are not inconsistent with the needs of the military.[32]

Protections of the Rule

Military Rule of Evidence 513 gives patients the privilege to prevent disclosure of a confidential communication with psychotherapists or their assistants. The communication must have been made for the purpose of "facilitating diagnosis or treatment of the patient's mental or emotional condition."[33] Under the rule, patients' confidential communications and related medical records are protected from disclosure or production before trial, and are protected from admission into evidence at trial.[34]

The rule broadly defines "psychotherapist." The definition includes psychiatrists, clinical psychologists, or clinical social workers that are licensed in any state or hold credentials from a military health care facility. It also includes "any person reasonably believed by the patient to have such a license or credentials."[35] An "assistant to a psychotherapist" is "anyone assigned to assist a psychotherapist in providing professional services, or reasonably believed by the patient to be so assigned."[36]

The rule also broadly defines "confidential communications." Communications are confidential if they are "not intended to be disclosed to third persons," except those to whom disclosure is reasonably necessary to further the professional services.[37]

Either the patient or his guardian can assert the privilege. The patient may also "authorize trial counsel or defense counsel to claim the privilege on his or her behalf."[38] Also, the "psychotherapist or assistant who received the communication may claim the privilege" on the patient's behalf.[39]

Exceptions to the Rule

There are a number of exceptions to MRE 513.[40] These exceptions address situations when the protections of the rule are unnecessary or when an important public interest mandates disclosure.

Patient's Death. The first exception provides that the privilege does not survive the patient's death.[41] In this case, disclosure will not hinder treatment.

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27. In *United States v. Demmings*, 46 M.J. 877 (Army Ct. Crim. App. 1997), the court suggested that after the Supreme Court recognized the psychotherapist-patient privilege, it could be available in military courts. *Id.* at 881. The ACCA held that Demmings had "waived the issue by [not raising the] privilege at his court-martial." *Id.* at 883.

28. United States v. English, 47 M.J. 215, 216 (1997). *See also* United States v. Flack, 47 M.J. 415, 417 (1998) (defense counsel not ineffective by failing to raise issue of psychotherapist-patient privilege).

29. United States v. Rodriguez, 54 M.J. 156, 161 (2000); United States v. Paaluhi, 54 M.J. 181, 183 (2000).

30. *Rodriguez*, 54 M.J. at 161.

31. MCM, *supra* note 2, MIL. R. EVID. 513.

32. *Id.* MIL. R. EVID. 513 analysis, app. 22, at A22-44.

33. *Id.* MIL. R. EVID. 513(a).

34. *See id.* MIL. R. EVID. 513(e).

35. *Id.* MIL. R. EVID. 513(b)(2).

36. *Id.* MIL. R. EVID. 513(b)(3).

37. *Id.* MIL. R. EVID. 513(b)(4).

38. *Id.* MIL. R. EVID. 513(c).

39. *Id.*

40. *Id.* MIL. R. EVID. 513(d).

Family Discord. The second exception deals with family discord. The privilege does not exist "when the communication is evidence of spouse abuse, child abuse or neglect," or when a "spouse is charged with a crime against the . . . other spouse or [one of their children]."[42] This is an important exception because many soldiers are charged with these types of offenses.[43]

Danger to Patient or Others. The next four exceptions to MRE 513 involve situations when patients may pose a danger to themselves or others. The privilege does not apply when law or service regulations impose a duty to report the communication;[44] when psychotherapists or their assistants believe the patient's mental or emotional condition makes the patient dangerous;[45] when "the communication clearly contemplated the future commission of a fraud or crime" or if the patient asks psychotherapists for help in the commission of a fraud or crime;[46] and when disclosure is "necessary to ensure the safety of military personnel, military dependents, military property, classified information, or a . . . military mission."[47]

Mental Condition on Defense. The seventh exception addresses the accused who raises the issue of his mental condition at court-martial. The accused loses the privilege when he offers evidence concerning his mental condition in defense, extenuation, or mitigation.[48]

Constitutionally Required Disclosure. The last exception to the rule prohibits the use of the privilege when disclosure is constitutionally required.[49] The accused's right to a fair trial may require disclosure of such statements.

Procedure

Military Rule of Evidence 513(e) details the procedure for determining the applicability of the privilege. When the privilege is in dispute, either party may ask the military judge for an interlocutory ruling.[50] The moving party must file a motion "at least five days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to."[51] The military judge can move this deadline forward or backward and may permit a party to file the motion during trial.[52] The moving party must "serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian."[53]

The military judge will conduct a hearing before ordering production or admission of psychotherapist-patient communications. At the hearing, which the military judge can close to the public, the parties "may call witnesses, including the patient, and offer other relevant evidence."[54] The court must allow the patient "a reasonable opportunity to attend the hearing and be heard," but need not unduly delay the proceedings.[55] The hearing is outside the presence of the members, and, if the military judge needs to examine the statement, the judge will do so *in camera.*[56] To prevent improper disclosure, the judge can issue a protective order or admit only part of a statement,[57] and the motion, related papers, and the record of the hearing are sealed.[58]

Protecting Statements Made by the Accused

Because of the many exceptions to MRE 513, defense counsel should not rely on the rule to protect statements made by a

41. *Id.* MIL. R. EVID. 513(d)(1).

42. *Id.* MIL. R. EVID. 513(d)(2).

43. *See* BUREAU OF JUSTICE STATISTICS, VIOLENCE BY INTIMATES (Mar. 1998); BUREAU OF JUSTICE STATISTICS, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS (Mar. 1996). Both publications can be found at the Bureau of Justice Statistics' Web site at www.ojp.usdoj.gov/bjs/pubalp2.htm.

44. MCM, *supra* note 2, MIL. R. EVID. 513(d)(3).

45. *Id.* MIL. R. EVID. 513(d)(4) (this includes danger to the patient himself).

46. *Id.* MIL. R. EVID. 513(d)(5).

47. *Id.* MIL. R. EVID. 513(d)(6).

48. *Id.* MIL. R. EVID. 513(d)(7).

49. *Id.* MIL. R. EVID. 513(d)(8).

50. MCM, *supra* note 2, MIL. R. EVID. 513(e)(1).

51. *Id.* MIL. R. EVID. 513(e)(1)(A).

52. *Id.*

53. *Id.* MIL. R. EVID. 513(e)(1)(B).

54. *Id.* MIL. R. EVID. 513(e)(2).

client to mental health professionals. There are several methods of protecting a client's conversation with a psychotherapist that are more effective than MRE 513. Defense counsel may have a mental health professional designated as a part of the defense team.[59] Alternatively, the defense can obtain a mental examination under Rule for Courts-Martial (RCM) 706.[60]

Mental health professionals can become a part of the defense team in two ways. Defense counsel can ask the convening authority or military judge to designate a psychotherapist as part of the defense team;[61] however, defense counsel will need to show that they need the assistance of a psychotherapist to prepare their case.[62] Alternatively, the accused may hire a private psychotherapist at his or her own expense to assist the defense counsel.[63] In either case, the attorney-client privilege protects the client's statements to his psychotherapist; any statements the client makes during therapy will be protected to the same extent as his conversations with his defense counsel.[64]

The second option for the accused is a mental status evaluation under RCM 706. Although the attorney-client privilege does not cover the psychotherapist who conducts this examination, the psychotherapist can only disclose limited information to the trial counsel.[65] Generally, this means that trial counsel will be unable to discover specific statements made by the accused.[66]

In either case, the defense counsel should closely monitor clients' conversations with mental health professionals. The defense counsel should explain disclosure limitations to the psychotherapist to ensure that he does not inadvertently reveal the clients' statements to prosecutors.

Obtaining Statements of Victims and Witnesses

Although MRE 513 provides little protection to statements made by the accused, it can provide substantial protections to statements made by victims and witnesses. This makes the defense counsel's job even more difficult. During pretrial preparation, defense counsel will want to examine statements made by victims and witnesses to psychotherapists. At trial, defense counsel will want to introduce anything helpful in the statements. Military Rule of Evidence 513 can create obstacles at both of these stages.

To overcome MRE 513 during pretrial discovery, defense counsel should argue that the Constitution requires disclosure of statements made by victims and witnesses to psychotherapists.[67] Due process guarantees the accused the right to discovery of material evidence that is favorable to the defense.[68] Defense counsel can demonstrate this by showing that the statements are admissible as evidence of bias or prior inconsis-

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55. *Id*.

56. *Id*. MIL. R. EVID. 513(e)(3).

57. *Id*. MIL. R. EVID. 513(e)(4).

58. *Id*. MIL. R. EVID. 513(e)(5).

59. *See* United States v. Toledo, 25 M.J. 270 (C.M.A. 1987).

60. *See* MCM, *supra* note 2, R.C.M. 706.

61. *See id.* R.C.M. 703(d). Defense counsel can find names and addresses of psychotherapists for this purpose on the Experts Directory of the Trial Defense Service Internet site, located at www.jagcnet.army.mil/USATDS.

62. *See id. See, e.g*., *Toledo*, 25 M.J. at 276.

63. *See Toledo*, 25 M.J. at 276.

64. *See* MCM, *supra* note 2, MIL. R. EVID. 502(a); *Toledo*, 25 M.J. at 275-76; United States v. Mansfield, 38 M.J. 415, 418 (C.M.A. 1993).

65. MCM, *supra* note 2, R.C.M. 706(c)(2). The trial counsel will only receive a statement consisting of the psychotherapist's ultimate conclusions to the following questions:

> (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?
> (B) What is the clinical psychiatric diagnosis?
> (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
> (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct and cooperate intelligently in the defense?

Id.

66. *See id.* R.C.M. 706(c)(5).

67. MCM, *supra* note 2, MIL. R. EVID. 513(d)(8).

tent statements. Defense counsel may also demonstrate this by showing how they may lead to other admissible evidence, such as testimony that a witness is untruthful.

The defense counsel often will not know the contents of the statements they seek. This makes it difficult to argue that their production is constitutionally required. Therefore, defense counsel must obtain as much background information about the victims and witnesses as possible to determine what their statements to psychotherapists and their mental health records may contain. Defense counsel should talk to the witnesses and victims and their families, friends, and co-workers.

Defense counsel may also gain access to the statements of victims and witnesses to psychotherapists by using other exceptions to MRE 513. For example, a psychotherapist may disclose a statement of a witness or victim if that patient poses a danger to others, including the accused.[69] The psychotherapist can also disclose statements that contemplate the commission of an offense, such as perjury.[70]

To overcome MRE 513 at trial, defense counsel should argue that the Constitution requires admission of statements made by victims and witnesses to psychotherapists. Defense counsel may do this by demonstrating that the statements reveal bias or prejudice.[71]

A defense counsel needing access to a protected statement should request relief from the military judge well before trial. The motion deadline is five days before the entry of pleas; the judge may waive this deadline only for good cause.[72]

Conclusion

Military Rule of Evidence 513 provides defense counsel with more burdens than benefits. It does not effectively protect clients' statements, but may effectively prevent defense counsel from discovering statements made by victims and witnesses.

Defense counsel should not over-rely on the rule's protections. Instead, they should seek other means of protecting their clients' statements, such as having the psychotherapist assigned to the defense team or by requesting a mental status evaluation under RCM 706.

Defense counsel must seek ways to overcome MRE 513 when it prevents access to the statements of victims and witnesses. Defense counsel can argue that the accused's right to a fair trial mandates disclosure, or that one of the other enumerated exceptions to MRE 513 requires access to the statements.

68. Pennsylvania v. Ritchies, 480 U.S. 39 (1987); Brady v. Maryland, 373 U.S. 83 (1963).

69. MCM, *supra* note 2, MIL. R. EVID. 513(d)(4).

70. *Id.* MIL. R. EVID. 513(d)(5).

71. *See* Olden v. Kentucky, 488 U.S. 227 (1988); Davis v. Alaska, 415 U.S. 308 (1974).

72. MCM, *supra* note 2, MIL. R. EVID. 513(e)(1)(A).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Consumer Law Note

Fair Debt Collection Practices Act (FDCPA)

Is the Thirty-Day Period to Request Verification of a Debt a Dispute Period or a Grace Period?

Military practitioners often assist legal assistance clients who are in debt and are being contacted by debt collection agencies. To represent these clients adequately, legal assistance attorneys must be intimately familiar with the Fair Debt Collection Practices Act (FDCPA).[1] Congress passed the FDCPA in 1978 to protect consumers from abusive collection practices, and to ensure that collectors who refrain from abusive practices are not competitively disadvantaged.[2] Since passage of the FDCPA, there has been confusion in both the collection industry and the legal profession about certain provisions of the Act.

The FDCPA contains many protections for debtors. It requires the debt collector to inform the debtor of his rights under the Act in the initial communication, or within five days of the initial communication with the debtor.[3] One right the collector must include in this notice is the debtor's right to dispute the debt within thirty days from the date of the notice.[4] If the consumer notifies the debt collector in writing within the thirty-day period that the consumer disputes the debt, the debt collector must cease collection of the debt until after obtaining and mailing verification of the debt to the consumer.[5]

The issue is whether the thirty-day period to request verification of the debt is a dispute period or a grace period. The majority of court decisions indicate that collection activity can continue during the thirty-day dispute period.[6] There are, however, court decisions holding that collection activity must cease until the thirty-day period has run, thereby making the thirty-day period a grace period.[7] The Federal Trade Commission's (FTC)[8] informal staff letters are also inconsistent on this issue.[9]

On 31 March 2000, the FTC addressed this issue in its first formal advisory opinion under the FDCPA.[10] The FTC determined that collection activities may continue during the thirty-day period that the debtor may request validation of the debt. The FTC's position is that "Nothing within the language of the statute indicates that Congress intended an absolute bar to any

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1. 15 U.S.C. § 1692 (2000). The FDCPA establishes general standards of proscribed conduct for debt collectors, defines and restricts abusive collection acts, and provides specific rights for debtors. *See id*.

2. S. REP. NO. 95-382, at 1 (1977), *reprinted in* NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION app. B (4th ed. 2000) [hereinafter NCLC, FAIR DEBT COLLECTION]. Common abusive collection tactics include:

> Phoning a debtor's parent, impersonating a government prosecutor, and requesting the parent to get the debtor to call about a criminal investigation regarding the debtor[; c]alling [five to fifteen] neighbors in a brief period of time, informing them that the debtor was suspected of receiving stolen goods, and asking them to go to the debtor's home and request the debtor to call the collector[; and t]hreatening the debtor and his parent with criminal charges for capital gains tax fraud unless the balance of the debt was put on the parent's credit card.

NCLC, FAIR DEBT COLLECTION, *supra*, at 33 (quoting *Fair Debt Collection Practice Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance, and Urban Affairs*, 102d Cong. 12-13 (1993) (testimony of Mr. Richard W. Bell, former debt collector)).

3. 15 U.S.C. § 1692. The most significant rights are: the right to terminate many future collection contacts, the right to stop contacts at work if the employer prohibits them; the right to stop contacts by obtaining counsel, and the right to obtain verification of a disputed debt. *See id.*

4. *Id.* § 1692g(a).

5. *Id.* § 1692g(b).

6. *See generally* NCLC, FAIR DEBT COLLECTION, *supra* note 2, at 255-60; NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION 30-32 (4th ed. 2000 and Supp.).

7. NCLC, FAIR DEBT COLLECTION, s*upra* note 2, at 255-60.

8. Section 1692l of the FDCPA appoints the FTC as the primary enforcement agency for the FDCPA. 15 U.S.C. § 1692*l*. As the enforcement agency, the FTC can issue informal staff letters (non-binding) or formal advisory opinions. *See id.* Acts done in conformity with an advisory opinion of the FTC are insulated from FDCPA liability. *See id.* § 1692k(e). FTC informal staff letters are not binding on the FTC or the courts and do not provide a defense for debt collectors. *See* Heintz v. Jenkins, 514 U.S. 291 (1995). Recent letters and the formal advisory opinion are available on the FTC Web site at http://www.ftc.gov/os/statutes/fdcpa/letters.htm.

9. NCLC, FAIR DEBT COLLECTION, *supra* note 2, at 258 n.997.

10. Mezines, Fed. Trade Comm'n Op. (Mar. 31, 2000), *available at* http://www.ftc.gov/os/2000/04/fdcpaadvisoryopinion.htm.

appropriate collection activity or legal action within the thirty-day period where the consumer has not disputed the debt."[11]

The Commission also opined that section 1692g permits a collection agency to either demand payment or take legal action during the thirty-day period for disputing a debt when a consumer has not notified the collection agency that the consumer disputes the debt.[12] The collection agency must ensure, however, that its collection activity does not overshadow and is not inconsistent with the disclosure of the consumer's right to dispute the debt.[13]

This opinion brings the FTC in line with the weight of judicial authority on this subject. Most courts view that section 1692g allows collection activity within the thirty-day period or until the debt collector receives a written dispute, provided the collection activities do not overshadow the debtors right to dispute the debt.[14] Any debt collection activities during the validation period should not contradict, obscure, or confuse an unsophisticated consumer about the legal right to obtain verification of the debt.

The key to temporarily stopping collection activity is a written dispute of the debt. Legal assistance attorneys should encourage clients to invoke their right to dispute debts, when appropriate. This provides the legal assistance attorney additional time to investigate the validity of the debt, and the debtor additional time to gather the funds necessary to make payment if the debt is valid. Because this right is only effective if the collector receives the dispute within thirty days from the first collection notice, legal assistance attorneys must include information about this right, and the others provided under the FDCPA, in preventive law briefings and information papers. Major Kellogg.

11. *Id*.

12. *Id*.

13. *Id*.

14. *See supra* note 6.

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

The Government Appeal "We Disagree, Your Honor!"

Introduction

You are the trial counsel in a contested general court-martial. The accused is charged with two specifications of drug distribution and one specification of drug use. Unfortunately, the government's case rests almost entirely on one witness, a less than truthful soldier who will testify that the accused sold him cocaine on two different occasions. The witness will also testify that on one of those occasions, the accused ingested cocaine in his presence. The only other evidence of drug use is the accused's positive urinalysis test result. The defense moved to suppress the urinalysis, arguing that the sample was illegally seized in violation of the accused's Fourth Amendment rights. The defense counsel just finished a convincing legal argument, albeit in your mind incorrect, and requested that the military judge suppress the positive urinalysis. You tried to explain to Judge Hardhead why the defense argument is wrong, but to no avail. Judge Hardhead now begins to state for the record his essential findings, and you see the writing on the wall—the urinalysis is going to be suppressed! As much as the judge's decision is troubling, you realize that his mind is made up, and there is nothing you can do to change it.

So now what? You have doubts about proving your case based entirely on the testimony of one witness, especially when that witness carries with him much fodder for cross-examination. While pondering your predicament, you are jolted back from your thoughts by Judge Hardhead's third and much louder repetition of "Counsel, are you ready to proceed?" Suddenly, an idea hits you: a government appeal! But what do you do next? How do you start one? What will the judge do? A closer look at the government appeal process will help answer these questions.

What Qualifies for a Government Appeal

The first step in understanding government appeals is to know what will qualify for an appeal. Not all rulings or orders by the military judge can be appealed. The applicable law addressing government appeals is Article 62, Uniform Code of Military Justice (UCMJ).[1] Article 62 specifically authorizes the President to prescribe regulations governing appeals by the United States.[2] Rule for Courts-Martial (RCM) 908 provides the general rules and specific procedural requirements for processing government appeals.[3] Rule for Courts-Martial 908(a) requires two conditions for a government appeal, a qualifying proceeding and a qualifying ruling.[4]

The first condition, a qualifying proceeding, requires that the appeal comes from a "trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged."[5] In other words, the proceeding must be a general court-martial (GCM) or a special court-martial (SPCM) authorized to adjudge a bad conduct discharge (BCD). In the hypothetical, you are at a GCM; therefore, the first condition for appeal is met.

The second condition, a qualifying ruling, is that the appealed order or ruling is one of four types: (1) an order or ruling that "terminates the proceedings with respect to a charge or specification";[6] (2) an order or ruling that "excludes evidence that is substantial proof of a fact material in the proceedings"; (3) an order or ruling that "directs the disclosure of classified information"; or (4) an order or ruling that "imposes sanctions for nondisclosure of classified information."[7] The urinalysis test result qualifies as "substantial proof of a material fact."[8] Accordingly, suppression of the urinalysis test in the hypothetical would qualify as a ruling that the government could appeal.

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1. UCMJ art. 62 (2000).

2. *Id.* art. 62(b).

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 908 (2000) [hereinafter MCM]. The President prescribed Rule for Courts-Martial 908 based upon Article 62. *See id.*

4. *Id.* R.C.M. 908(a).

5. *Id.*

6. An appellate court may also consider an appeal of an order or ruling that is the "functional equivalent" of a ruling that terminates the proceedings. *See, e.g.*, United States v. True, 28 M.J. 1 (C.M.A. 1989) (holding that a military judge's abatement order was the functional equivalent of a ruling that terminates the proceedings).

Procedure for the Trial Counsel

After determining that the military judge's ruling qualifies for a government appeal, the next step requires an understanding of the procedure. The first and most important thing to remember is that the rule provides the trial counsel, upon request, with seventy-two hours to determine whether to file an appeal. The request halts the proceedings "except [for] matters unaffected by the ruling or order."[9] The trial counsel can use this time to figure out the rest of the procedure for a government appeal, and to seek the wisdom of the chief of justice and the staff judge advocate (SJA) before proceeding further.[10]

If the government decides to appeal, the trial counsel must file a "notice of appeal" with the military judge within the 72-hour delay period.[11] The trial counsel must have authorization from the GCM authority or SJA to file the notice of appeal.[12] The notice must identify the ruling or order appealed and the charges and specifications affected. The trial counsel must certify that the appeal is not "for the purpose of delay and (if the ruling appealed is one which excludes evidence) that the excluded evidence is substantial proof of a [material fact]."[13] The certificate must also reflect the date and time of the military judge's ruling, and the date and time the certificate was served on the military judge.[14] Service of the notice of appeal on the military judge imposes an automatic stay of the ruling or order.[15]

The Chief, Government Appellate Division (GAD), ultimately decides whether to file the appeal with the appellate court.[16] The trial counsel's job is to forward the appeal "promptly and by expeditious means."[17] *Army Regulation 27-10* requires the trial counsel to forward the appeal within twenty days of service of the notice of appeal on the military judge.[18] The appeal must include a statement of the issues appealed,[19] the certificate of notice of appeal, and four copies of the record of trial.[20] This requires preparation and authentication of a verbatim record of trial. The record of trial should cover only those proceedings that relate to the issue being appealed. The military judge or appellate court, however, may direct inclusion of additional portions of the proceedings.[21]

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7. MCM, *supra* note 3, R.C.M. 908. The rule also adds two additional grounds for appeal that are closely related to the fourth type: "The United States may also appeal a refusal by the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information or to enforce such an order that has previously been issued by the appropriate authority." *Id.* The rule specifically provides, however, "that the government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification." *Id.* A charge or specification dismissed on multiplicity grounds, therefore, qualifies as an appealable ruling, whereas a military judge's decision to grant a defense motion for a finding of not guilty pursuant to RCM 917 does not. *See, e.g.*, United States v. Weymouth, 43 M.J. 329 (1995); United States v. Adams, 52 M.J. 836 (A.F. Ct. Crim. App. 2000).

8. The question of whether the excluded evidence is "substantial," is determined by the petitioner. *See, e.g.*, United States v. Scholz, 19 M.J. 837 (N.M.C.M.R. 1984). It is not necessary for the suppressed urinalysis result to be the only government evidence in the case. *See, e.g.*, United States v. Pacheco, 36 M.J. 530 (A.F.C.M.R. 1992).

9. MCM, *supra* note 3, R.C.M. 908(b)(1).

10. The Trial Counsel Assistance Program (TCAP) should also be contacted since TCAP serves as the liaison between the chief of justice and the Government Appellate Division (GAD) on government appeals. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 22-2 (20 Aug. 1999) [hereinafter AR 27-10].

11. MCM, *supra* note 3, R.C.M. 908(b)(2).

12. AR 27-10, *supra* note 10, para. 13-3(a). Trial counsel should check local supplements of *AR 27-10* for additional information.

13. MCM, *supra* note 3, R.C.M. 908(b)(3).

14. AR 27-10, *supra* note 10, para. 13-3(b).

15. MCM, *supra* note 3, R.C.M. 908(b)(4). Just as the seventy-two-hour delay is only for matters affected by the ruling or order, the automatic stay does not prevent litigation of motions concerning charges and specifications not affected by the ruling or order. If the trial on the merits has not yet begun, a severance *may* be granted as to the unaffected charges and specifications. If the trial on the merits has begun, the military judge may allow presentation of further evidence on the unaffected charges and specifications. *Id.*

16. AR 27-10, *supra* note 10, para. 13-3(a). The Chief, GAD, makes the decision after coordination with the Assistant Judge Advocate General for Military Law and Operations. *Id.* The TCAP serves as the liaison between the field and the GAD concerning potential appeals under Article 62. *Id.* para. 22-2.

17. MCM, *supra* note 3, R.C.M. 908(b)(6).

18. AR 27-10, *supra* note 10, para. 13-3(c). The twenty-day deadline of AR 27-10 includes submission of the record of trial. *Id.* Although the regulation allows for twenty days, the drafters of the rule state that "ordinarily the matters specified should be forwarded within one working day." According to the drafters, "the record need not be forwarded at this point as that might delay disposition." MCM, *supra* note 3, R.C.M. 908 analysis, app. 21, at A21-55. To meet the one-day requirement, trial counsel can forward a summary record for preliminary consideration. *Id.*

19. MCM, *supra* note 3, R.C.M. 908(b)(6).

20. AR 27-10, *supra* note 10, para. 13-3(c). The four copies of the verbatim record of trial include an original and three copies. *Id.*

What Happens Next: The Appellate Proceedings

Once you ship the necessary materials to GAD, you have completed your expected portion of the appeal, for now. If the Chief, GAD, decides to file the appeal with the Army Court of Criminal Appeals (ACCA), the original record of trial is promptly filed with the court and a copy forwarded to the appellate defense counsel.[22] It may be some time before the ACCA resolves the issue. The ACCA Rules allow GAD at least twenty days from the date the record of trial is filed with the ACCA to file the appeal and supporting brief.[23] The rules then provide appellate defense counsel twenty days to file a response.[24] Article 62 and RCM 908 state that government appeals "shall, whenever practicable, have priority over all other proceedings before [the court]."[25] Because of the generous filing timeline, however, it may be two months or more from your 72-hour delay request until the ACCA decides the appeal.[26]

Once the ACCA decides the issue, the Clerk of Court will notify the military judge and the convening authority.[27] Either party can request that the Court of Appeals for the Armed Forces (CAAF) review the ACCA decision; the accused has sixty days from notification of the ACCA decision to make such request. The court-martial can now proceed with the affected charges and specifications, unless the proceedings are further stayed by the ACCA decision or by the CAAF.[28]

Finishing Up: The Remainder of Trial Counsel Duties

The accused will normally be notified of the ACCA decision orally on the record by the military judge.[29] This notification can also be made in accordance with RCM 1203(d).[30] Either method requires the trial counsel to prepare a certificate of notification. The certificate must include the fact that the accused was notified, the method of notification used, and the date notification was made.[31] The trial counsel must immediately send the certificate to the ACCA Clerk of Court.[32] If the decision is adverse to the accused and "the accused is notified orally on the record," RCM 908(c)(3) also requires the trial counsel to forward the certificate to The Judge Advocate General.[33]

Conclusion

Government appeals are not that common. The hypothetical at the outset is certainly more common than appeals filed with the ACCA under Article 62. It is important, however, that counsel are aware of the availability of such an option and that they understand the procedure involved. Returning to the hypothetical, Judge Hardhead asks the question, "Counsel, are you ready to proceed?" You now respond: "We disagree, your honor! The government requests a seventy-two-hour delay pursuant to Rule for Courts-Martial 908(b)(1) to determine whether to appeal your ruling." Major Harder.

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21. MCM, *supra* note 3, R.C.M. 908(b)(5).

22. U.S. DEP'T OF ARMY, REG. 27-13, MILITARY JUSTICE: COURTS OF MILITARY REVIEW RULES OF PRACTICE AND PROCEDURE, R. 21.1(a) (29 May 1986) [hereinafter ACCA Rules]. The Defense Appellate Division (DAD) will represent the accused. *See* MCM, *supra* note 3, R.C.M. 1202.

23. ACCA Rules, *supra* note 22, R. 21(d)(1).

24. *Id.* R. 21(d)(2).

25. UCMJ art. 62(b) (2000); MCM, *supra* note 3, R.C.M. 908(c)(2).

26. Any delay resulting from a government appeal is excluded from speedy trial issues, unless the appeal is "filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit." UCMJ art. 62(c).

27. AR 27-10, *supra* note 10, para. 13-3(d).

28. MCM, *supra* note 3, R.C.M. 908(c)(3).

29. *See id*.

30. *See* MCM, *supra* note 3, R.C.M. 1203(d). Rule for Courts-Martial 1203(d) provides the rules for notification to the accused of decisions of a Court of Criminal Appeals on direct review. *See id*.

31. AR 27-10, *supra* note 10, para. 13-3(d).

32. *Id*.

33. MCM, *supra* note 3, R.C.M. 908(c)(3).

Preparation Tips for the Deployment of a Brigade Operational Law Team (BOLT)

This is the fourth in a series of CLAMO notes discussing tactics, techniques, and procedures (TTP) for a Brigade Operational Law Team (BOLT) preparing to deploy to the Joint Readiness Training Center (JRTC). These TTPs are based on the observations and experiences of Operational Law (OPLAW) Observer/Controllers (O/Cs) at the JRTC. The JRTC OPLAW O/C Team suggests a four-stage "battle-focused training" approach to BOLT preparation for a JRTC rotation. This training first prepares the individual BOLT member, transitions to prepare the BOLT as a whole, then prepares the brigade staff, and finally focuses on the entire brigade task force. These training steps should prove useful to BOLTs in achieving success at the JRTC.

The final aspect of the BOLT training plan addresses BOLT preparation of the entire brigade task force. Although matters involving each core legal discipline affect the brigade during pre-deployment preparation, this article addresses three key areas that cause significant challenges for BOLTs—Rules of Engagement (ROE) Training and Dissemination, Fratricide and Serious Incident Reporting, and Law of War Training. It then offers TTPs on each to enhance the success of the BOLT and brigade by preparing the brigade for the legal hurdles to come.

ROE Training and Dissemination

Rules of Engagement are the commander's rules for the use of force and an operational responsibility. Nevertheless, responsibility for preparing, training, and disseminating ROE at the brigade level often falls on the BOLT as the staff section best equipped to assist operators navigating through higher headquarters ROE. The BOLTs must be involved early to ensure that all brigade units and attachments are fully trained on baseline Standing Rules of Engagement (SROE) for U.S. forces.[1] The BOLTs must also develop a plan to quickly distribute mission-specific ROE to the brigade upon receipt.

Training

Rules of Engagement training is an ongoing process that should be accomplished at the individual, small-unit, and leader levels. With the Chairman of the Joint Chiefs of Staff (CJCS) SROE as a focal point, ROE training using one of the many available training models ("five Ss" and "RAMP," for example) inculcates in every soldier a ready response to interactions with both civilians and declared hostile forces. Specifically, a soldier who is well-trained in the ROE should be able to recognize immediately and intuitively hostile forces and acts, and assess and react to demonstrated hostile intent with appropriate force to ensure mission success.

Identifying and appropriately reacting to threats requires more than a two-hour ROE briefing in a hot gymnasium the week before deployment. Army doctrine[2] and field experience show that soldier ROE training is best accomplished at the small-unit level with scenario-driven vignettes and situational training exercises (STX) that require soldiers to apply the ROE.[3] Similarly, ROE training for leaders should culminate with command-post exercises (CPX), or field training exercises (FTX), or both.[4] Recognizing the effectiveness of practical ROE application for training, XVIII Airborne Corps requires ROE inclusion into unit exercises at all levels.[5] Before the start of XVIII Airborne Corps' recent Mission Rehearsal Exercise for forces deploying to Kosovo, Forces Command required platoon and company-sized units to complete STX lane training with integrated ROE components.[6] Several resources contain sample vignettes for home-station training, including the CLAMO ROE Handbook,[7] the Center for Army Lessons

1. Chairman, Joint Chiefs of Staff, Instr. 3121.01A, Standing Rules of Engagement for U.S. Forces, encl. A, para. 1c(1) (15 Jan. 2000) (partially classified document).

2. U.S. Dep't of Army, Field Manual 27-100, Legal Support to Operations (1 Mar. 2000).

3. *See* Center for Law and Military Operations, The Judge Advocate General's School, U.S. Army, Rules of Engagement (ROE) Handbook for Judge Advocates 2-2 (1 May 2000) [hereinafter ROE Handbook] (training should begin in the classroom and end with exercises in the field). *See also* Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 Mil. L. Rev. 1 (1994); Int'l & Operational Law Dep't, The Judge Advocate General's School, U.S. Army, Operational Law Handbook ch. 5 (2002) [hereinafter OpLaw Handbook]; U.S. Army Training and Doctrine Command, Center for Army Lessons Learned (CALL), *ROE Training – An Alternative Approach*, CALL Newsletter 96-6 (May 1996) [hereinafter CALL Newsletter 96-6].

4. *See* ROE Handbook, *supra* note 3, at 2-2; OpLaw Handbook, *supra* note 3, at 73.

5. U.S Army XVIII Airborne Corps and Fort Bragg, Reg. 350-41, ch. 18 (12 Jan. 1998).

6. *See* Headquarters, XVIII Airborne Corps, Warning Order for Operation Dragon Guardian I KFOR 3A Mission Rehearsal Exercise (MRE), app. 5, tabs C-G (C1, 17 Jan. 2001) (containing situational training exercise (STX) lane training and evaluation outlines) (on file with author).

Learned Newsletter 96-6,[8] and the CLAMO Web site at http://www.jagcnet.army.mil/CLAMO-Training.

While baseline ROE training on the JCS SROE is continuous, the brigade should begin mission-specific ROE training for JRTC in earnest at D-80, when the brigade receives the 21st Infantry Division (Light)[9] (21st ID (L)) Operation Plan (OPLAN) and intelligence estimate.[10] The OPLAN gives the staff a "90% solution" as to what they should expect upon deployment to Cortina,[11] including the mission-specific ROE. The intelligence products will identify the likely hostile forces. With this information, the BOLT can tailor briefings, training vignettes, and STXs to the specifics of the Cortina mission.

The BOLT that conducts pre-deployment ROE training often limits that training to the maneuver battalions, because they are the primary "shooters." While enemy contact is part of the infantry mission, BOLTs should not neglect the other combat arms, combat support, and combat service support units. As the intelligence products indicate, Cortina is a fluid battlefield with a non-linear threat.[12] Terrorists, insurgents, government officials, and host-nation civilians are located everywhere, including the brigade support area (BSA), aviation assembly area (AAA), and artillery batteries, to name a few. Every brigade element carries weapons, and security detachments from the BSA, AAA, and other units often have contact with the denizens of Cortina. Because it only takes one ROE misapplication to endanger the force or affect national policy, BOLTs should ensure that everyone knows, understands, and applies the current ROE.[13]

Non-habitually assigned units pose a common dilemma for ROE trainers. Light infantry brigades training at the JRTC often attach elements from armored units, mechanized infantry units, Air Force, Marine, or special operations units, with which the brigade lacks a habitual relationship. While these units bring unique and powerful capabilities to the brigade, they also present a number of challenges for ROE training. The foremost challenge is distance, because the attached units are rarely co-located with the brigade. The BOLT must assist in identifying who will be responsible for training these units on the deployment ROE, determining how they will conduct such training, and reporting completion of that training to the BOLT.

The brigade must understand and integrate the special capabilities of attached units. For example, a company commander who has spent his entire career in the Army light infantry community may find his unit working with a company of Marines with light armored vehicles for a mission. Although the S-3 and commander bear responsibility for the tactical integration of the team, the BOLT should be aware of the heightened risk of fratricide or ROE violations and consider supplemental ROE to mitigate these risks. The BOLT should recognize that any new weapon platform, vehicle, or uniform introduced to the brigade may call for ROE modifications to account for the brigade's lack of familiarity with that new item.

Dissemination

The brigade staff receives the final mission-specific ROE with the Division Operations Order (OPORD) shortly before operations begin. With little time to conduct training, the brigade (and specifically, the BOLT) must ensure that the final ROE are disseminated throughout the entire force. Although most brigades publish ROE annexes and pocket cards, BOLTs rarely stop to consider whether these products effectively communicate the ROE to the target audience.

Pocket cards provide a resource for refresher hip-pocket training or perhaps a quick reference when time allows, but often go unread by the soldiers on the ground. They are further limited in their effectiveness due to their size. Pocket cards that merely restate the CJCS SROE and self-defense principles may have some value as a training aid but are no substitute for mission-specific ROE briefings and training. A soldier who must consult a card to determine whether to act in self-defense will likely be a casualty before he finishes reading the card. Pocket

7. ROE Handbook, *supra* note 3, app. E.

8. CALL Newsletter 96-6, *supra* note 3, app. C.

9. Brigades training at the JRTC are notionally attached to the 21st Infantry Division (Light), replicated by JRTC staff. U.S. Army Forces Command, Reg. 350-50-2, Training at the Joint Readiness Training Center (JRTC) para. 2-8b (15 June 1998) [hereinafter FORSCOM Reg. 350-50-2].

10. *Id*. app. Y, tbl. Y-2.

11. "Cortina" is the name of the notional country roughly the size of Louisiana in which brigades conduct operations while at the JRTC. *See id.* app. H, para. H-1a.

12. *See, e.g.*, Headquarters, 21st Infantry Division (Light), Operations Order 01-XX-1, annex B (intelligence) [hereinafter OPORD 01-XX-1] (on file with author).

13. For example, the 10th Mountain Division soldiers deployed to Haiti in support of Operation Uphold Democracy were not trained or told they were authorized to prevent serious Haitian-on-Haitian criminal acts. Although the Chairman of the Joint Chiefs of Staff approved ROE permitting such intervention on 18 September 1995, these ROE were not transmitted to the soldiers on the ground. Thus, on 20 September 1995, American television reporters filmed U.S. soldiers observing, but not intervening, as Haitian police beat Aristide supporters to death. The American public outcry resulted in an apparent "change" to the ROE the next day via a newly printed and distributed ROE card that permitted U.S. forces to prevent serious criminal acts that were observed. Although perceived by the public at large as a change in U.S. policy, it was in reality a failure to distribute previously approved ROE throughout the force. Nevertheless, failure to draft, distribute, and train ROE properly resulted in media scrutiny and criticism of the highest levels of command. *See* Center for Law & Military Operations, The Judge Advocate General's School, U.S Army, Law and Military Operations in Haiti, 1994-1995: Lessons Learned for Judge Advocates 37-39 (11 Dec. 1995).

cards listing mission-specific ROE are limited by security classification requirements. Moreover, production and distribution constraints may also hinder ROE card effectiveness.

An ROE annex to the brigade order puts all the ROE in one easy-to-access location. The BOLTs, however, often abbreviate these annexes because they feel pressured to produce a product quickly. These annexes often lack precision and contain inaccuracies. The 21st ID (L) Division ROE annex is about fourteen pages.[14] Brigade staff sections are often pressured to keep their respective annexes to one to two pages in length. Assuming that the Division order did not contain needless or redundant language in its ROE, "distilling" the Division annex into a one-page "summary" may eliminate clarifying language that is important to the Division commander and staff.

Additionally, time is scarce and copies of the OPORD are even more scarce. After the Division OPORD briefing, the brigade staff shares one copy of the order, with each section taking their relevant annex.[15] This generally means that the BOLT often gets the ROE annex, thereby assuming responsibility for the brigade's adherence to the ROE as the staff conducts mission analysis and follow-on phases of the Military Decision Making Process.[16] It also indicates that attention to, and comprehension of, the ROE at units below brigade level may be suspect. Although publication of an ROE annex purports to accomplish the specified task to "[d]isseminate the ROE . . . to the lowest echelons of all units . . . ,"[17] in reality it is often nothing more than a *pro forma* attempt to satisfy this Division-directed task.

The BOLT must ensure that the brigade is aware of all Division ROE—those contained in the ROE annex as well as those in the coordinating instructions to other parts of the OPORD. When necessary, the BOLT should raise ROE issues during mission analysis and ensure that the various staff sections incorporate ROE into both mission planning and specific portions of the brigade OPORD. For example, firing battery personnel, forward observers, and mortarmen most likely refer to the fire support annex for their portion of the mission. As such, restrictions on fires in populated areas should be placed in this annex, to be read by the target audience. Rules of Engagement applicable to multiple brigade elements should be developed in the operations annex or base order.

Finally, the BOLT should brief mission-critical ROE or significant ROE changes to company and battalion commanders and staff during the brigade OPORD brief. This allows the BOLT to identify for subordinate commanders the Division's specified task to ensure all brigade personnel are briefed and trained on the ROE, as well as the requirement to report that training back to Division through the BOLT.

Rules of Engagement training and dissemination is a comprehensive task. At the soldier level, JCS SROE training should be a part of routine garrison training at all levels. Before a JRTC deployment, the training should intensify, incorporating mission-specific ROE from the D-80 OPLAN into briefings and training events. The BOLT should coordinate with the brigade S-3 to ensure that attached units also receive the training. Upon receipt of the OPORD, the BOLT needs to analyze all ROE and distribute the ROE through the lowest echelons so that all understand when and how force is employed appropriately.

Fratricide and Serious Incident Reporting

The BOLT often struggles with discovering, investigating, and analyzing fratricides,[18] inappropriate uses of force against civilians, and other serious incidents. The lack of attention units give to these incidents typically results in a failure to report timely and accurately, investigate, and analyze the incidents to incorporate lessons learned into subsequent operations. Home station preparation can alleviate these concerns.

Discussed in detail below, each of these issues may stem in part from a soldier and leader's lack of appreciation of the full impact of fratricides and other serious incidents on the unit. Reporting and investigation requirements are not merely Army requirements;[19] they serve practical purposes not always apparent to brigade leaders who traditionally focus on maneuver. At the tactical level, fratricides and other serious incidents involving civilians inject friction by bleeding off combat power and angering the local population. At the operational and strategic levels, however, these incidents can impact United States or host nation resolve, or dramatically affect ROE and the conduct of future operations.[20] Brigade commanders and Information Operations sections must know the facts of serious incidents

14. OPORD 01-XX-1, *supra* note 12, annex E (Rules of Engagement).

15. At the JRTC, this distribution method has been observed in practice and spelled out in several brigade Tactical Standing Operating Procedures (TACSOPs).

16. OPLAW HANDBOOK, *supra* note 3, at 475-90.

17. OPORD 01-XX-1, *supra* note 12, para. 3b(3).

18. "Fratricide" is defined as "the unintentional killing or wounding of friendly personnel by friendly firepower." U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 4-27 (14 June 2001) [hereinafter FM 3-0].

19. U.S. DEP'T OF ARMY, REG. 385-40, ACCIDENT REPORTING AND RECORDS paras. 2-4m, q (1 Nov. 1994) [hereinafter AR 385-40].

20. For example, the bombing of the Al-Firdos bunker in Baghdad during Desert Storm, killing 204 civilians, resulted in dramatic restrictions on further targeting within the city and a shift in focus of the air campaign. *See* RICK ATKINSON, CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR 285-96 (1993).

and fratricides and be able to address them when dealing with the media, host-nation political and law-enforcement officials, and higher headquarters. Commanders and staffs must quickly identify the causes of such incidents to ensure that they are not repeated. By integrating these themes throughout home station training, the BOLT can teach the brigade to place a priority on reporting, investigating, analyzing, and ultimately preventing these incidents.[21]

Reporting

Under the 21st ID (L) OPORD, brigades must report serious incidents, including fratricides and inappropriate uses of force against civilians.[22] When a fratricide or serious incident occurs, the O/Cs inform the rotational unit of such occurrence.[23] Knowledge, however, does not always equate to action. Accordingly, BOLTs frequently fail to learn of fratricides from the subordinate brigade units, and seldom within the Division time limits.[24] These reporting challenges occur most often because the shooting unit fails to report the event to battalion, the battalion does not forward it to brigade, or the brigade does not prioritize the report and route it to the BOLT.

Brigades can avoid these challenges by training to report fratricides and serious incidents through the chain of command to the BOLT as part of the unit Standing Operating Procedure (SOP). Given the severity of such incidents, investigations are inevitably required.[25] The BOLT should train the brigade to report these events and capture such reporting requirements and procedures in the brigade and battalion tactical SOPs, because these SOPs focus and direct unit operations while deployed on any exercise or operation.[26] Moreover, incident reporting should be reinforced during pre-deployment ROE training. The BOLT can emphasize the reporting requirement in the brigade OPORD by nominating fratricides and other serious incidents as a Commander's Critical Information Requirement for the brigade base order to reinforce the SOP and Division OPORD requirements.[27] Finally, the BOLT should consider training battalion and brigade TOC radio-telephone operators and battle captains to report all fratricides and serious incidents to the BOLT.

Investigation

All fratricides and serious incidents during a training rotation at the JRTC require an investigation. Given the challenges and operating tempo of the JRTC battlefield, BOLTs routinely struggle with timely completion of satisfactory investigations, often falling short of Division suspenses. Simple pre-deployment preparation can facilitate completing these investigations.

Armed with the knowledge that fratricides and serious incidents require an investigation, the BOLT should prepare subordinate commanders and staff officers to become investigating officers (IO) and devise a system to appoint and resource them when a fratricide occurs. The BOLT should request signature authority from the brigade commander to appoint the IO[28] and coordinate with the brigade S-1 to obtain a Department of the Army (DA) Form 6 containing the names of officers who can potentially serve as an IO.[29] Before deployment, the BOLT should prepare investigation packets containing Privacy Act statements, sworn statement forms, copies of *Army Regulation (AR) 15-6*, and DA Form 1574 (Report of Investigation). Legal specialists should stand by to assist the IOs as soon as they are appointed and as needed throughout the investigation.

The BOLT should also seek opportunities to teach leader development classes on these issues before deployment. These

21. Law of War and ROE training, covered in this note, address the long-term home station training designed to prevent such incidents. Although the BOLT has a part in fratricide prevention by virtue of its role in investigation review and ROE development, fratricide avoidance is primarily an operational responsibility. *See* FM 3-0, *supra* note 18, para. 4-27. Fratricide prevention TTPs are available in various newsletters and guides from the CALL, accessible on-line at http://call.army.mil.

22. OPORD 01-XX-1, *supra* note 12, para. 3d(2)(c)(5) (Commander's Critical Information Requirements (CCIR), Friendly Forces Information Requirements (FFIR)). *See also id*. annex E, app. 1 (Rules of Engagement, reports).

23. U.S. DEP'T OF ARMY, JOINT READINESS TRAINING CENTER, OBSERVER/CONTROLLER HANDBOOK, app. K, para. K-1 (6th ed. 1990).

24. Over the past two years, brigades suffered an average of twenty-two fratricides per JRTC training rotation. Less than 15% of all fratricides are reported to or discovered by the BOLT through brigade channels. The JRTC OPLAW O/C team maintains a fratricide database for standard brigade combat rotations.

25. AR 385-40, *supra* note 19, para. 2-4m, q.

26. The BOLT should coordinate any recommended changes to the TACSOP with the brigade S-3 and submit the recommended language and location revisions as soon as they are identified. The brigade S-3 can also provide information concerning the timing of the next TACSOP revision.

27. *See, e.g*., OPORD 01-XX-1, *supra* note 12, para. 3d(2)(c)(5).

28. Notwithstanding Army regulations, at JRTC brigade level commanders are delegated authority to appoint IOs to investigate rotational fratricides. *Compare* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 2-1a(3) (30 Sept. 1996) [hereinafter AR 15-6] (only a general court-martial convening authority or his staff delegate can appoint an IO for certain incidents), *with* FORSCOM REG. 350-50-2, *supra* note 9, para. 3-3b (JRTC Operations Group Commander can order brigade chain of command to investigate simulated fratricides in accordance with AR 15-6).

29. A DA Form 6 is a roster of names used to provide an orderly and fair means of assigning nonstandard duties.

classes should provide information on the procedures and standards for *AR 15-6* investigations, including how to tie findings of fact into recommendations and conclusions. Potential IOs should understand that timely and thorough completion of directed investigations is an IO responsibility. The BOLT's role is to focus appointed IOs on both the legal requirements and timely completion of investigations.

Analysis

The training objective behind the investigation requirement is not merely for the IO and the BOLT to manage investigations, but to raise the brigade's awareness and incorporate the lessons from these investigations into subsequent operations. While identifying systemic causes of fratricides and serious incidents is not a legal function, the BOLT is the best-positioned staff section to do so because it reviews every investigation. The BOLT can facilitate this process by specifically tasking the IO in the appointing order to identify contributing factors to the fratricide.

For example, at the JRTC, small arms engagements across companies resulting in fratricide are often caused by the lack of a clear understanding of the unit boundaries and the failure to coordinate with the adjacent unit. When IOs identify such factors in their investigations, the BOLT should ensure that the brigade commander and staff receive this information before the next mission. By focusing the fratricide investigation, analyzing the investigation's results, and educating brigade leaders on the IO's findings, the BOLT contributes directly to the protection of combat power.[30]

Law of War Training

A separate but related challenge for the BOLT involves the brigade's adherence to the Law of War (LOW). Pre-deployment LOW training can minimize concern over this issue. All soldiers and officers receive basic LOW training ("The Soldiers' Rules") upon entry on active duty.[31] Refresher LOW training conducted within the units should adapt the LOW principles to the unit's current mission and contingency plans.[32]

A JRTC rotation exercises the practical application of LOW principles. While soldiers know that they should not execute or torture enemy prisoners of war (EPW), units rotating through the JRTC consistently demonstrate the need for refined LOW training before deployment. Consider the following examples of rotational unit conduct observed during JRTC rotations:

- The brigade staff positions a dislocated civilian collection point adjacent to an artillery battery immediately prior to the brigade's conduct of defensive operations;
- A company commander evicts a suspected enemy sympathizer from her home to establish a command post and destroys all furnishings and decorations within;
- Following an engagement, a company commander prioritizes two of his own "routine/walking wounded" casualties aboard an air medevac helicopter ahead of two enemy "litter-urgent" EPW casualties, who are left behind to die from their wounds;
- A brigade sniper is transported to hide sites around the battlefield in a field ambulance;
- A stinger air-defense team positions itself atop the town hospital; and
- Numerous EPWs are placed under the supervision of the counterintelligence team, which places them within a 10' x 10' area surrounded by concertina wire that is in the direct sunlight and denies them water to make them "more willing to talk."

This list is typical of the LOW issues that plague rotational units at some point during a rotation. Notably, neither the JRTC O/Cs or role-play staff drives these issues; they all arise from the brigade members' own decisions.

A solid brigade pre-deployment training plan may begin with generic LOW briefings but should not end there. Like ROE, LOW principles are applied best in STX lanes and FTXs, however, LOW STX lanes are difficult to design without a dedicated opposing force, role-playing civilians, and a developed training area infrastructure. Accordingly, the BOLT must supplement briefings with vignette training and follow-on discussion to encompass some of the less dramatic but equally troubling situations described above.[33] As these examples make clear, the BOLT must ensure that soldiers and leaders alike receive this training.

Finally, the BOLT must maintain visibility on all operational planning to protect brigade leaders from inadvertently violating the LOW and to report outright LOW violations.[34] The TTP to

30. FM 3-0, *supra* note 18, ch. 4.

31. U.S. DEP'T OF ARMY, REG. 350-41, TRAINING IN UNITS ch. 14 (19 Mar. 1993).

32. *Id*.

33. Sample LOW training presentations are available on-line at www.jagcnet.army.mil/CLAMO-WarCrimes. Vignettes and other training devices may be found in the OPLAW HANDBOOK, *supra* note 3, the INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW OF WAR DESKBOOK (June 2000), and online at www.jagcnet.army.mil/CLAMO-training.

counter these reporting challenges mirror those relating to fratricides and serious incident reporting discussed previously.

Law of War matters are often paid lip service by brigade leaders, under the assumption that a good soldier intuitively understands the line between criminal and lawful acts. The LOW, however, raises issues that conflict or appear to conflict with mission accomplishment, such as the duty to evacuate friendly and enemy casualties in triage order, as opposed to all friendly casualties first. Brigades must not neglect LOW training during pre-deployment preparations, and the BOLT should ensure that the training addresses the "gray areas" of LOW combatant obligations not rising to the level of willful criminal acts.

Conclusion

Legal preparation of a brigade for deployment to a Combat Training Center (CTC) is a comprehensive process involving multiple issues across the core legal disciplines. The three subjects discussed in this note routinely cause an inordinate amount of angst that the BOLT can avoid if they address them in a solid pre-deployment training plan. Moreover, the BOLT and the Office of the Staff Judge Advocate (OSJA) must contend with the many legal assistance, claims, and administrative and civil law matters involved in moving 4,000 plus soldiers and their equipment hundreds or thousands of miles away from home for an extended period. The TTP and lessons learned for these issues may be found in the various publications from the CLAMO and the International and Operational Law Department at The Judge Advocate General's School, U.S. Army, most notably the Operational Law Handbook.[35] Judge Advocates and legal specialists should study these issues at length before a rotation to ensure proper planning and preparation for the brigade's train-up and subsequent deployment.

The CLAMO examines legal issues that arise during all phases of military operations and devises training and resource strategies for addressing those issues. This series of CLAMO Notes has posited the framework for a BOLT training plan in preparation for a JRTC deployment. The specific subject areas discussed in each of the four notes are those that regularly challenge BOLTs, based upon the observations and experiences of the O/Cs at the JRTC at Fort Polk, Louisiana. The JRTC OPLAW O/C Team recommends that BOLT and OSJA leaders draft and implement short and long-range BOLT training plans to incorporate the principles discussed in these notes, positioning BOLTs to provide better legal advice and services to commanders throughout their brigade. The JRTC OPLAW O/C Team.

The Center extends its sincere appreciation to the current and former JRTC OPLAW O/C Team for producing this superb four-part series on Preparation Tips for BOLTs deploying to the JRTC.

For more information on the JRTC, or to contact the JRTC OPLAW O/C Team, see the CLAMO's "Combat Training Centers" database at www.jagcnet.army.mil/CLAMO-CTCs.

34. U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 4.3-4.4 (9 Dec. 1998).

35. OPLAW HANDBOOK, *supra* note 3.

Notes from the Field

Assert Timeliness Issue Early to Preserve the Defense in Title VII Cases

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In a recent case, *Ester v. Principi*, the Court of Appeals for the Seventh Circuit indicated its intent to preclude federal agencies from asserting dispositive timeliness defenses in certain Title VII cases.[1] The Seventh Circuit concluded that when an agency "decides the merits of a[n Equal Employment Opportunity (EEO)] complaint during the administrative process without addressing the question of timeliness, [the agency] waives a timeliness defense in a subsequent lawsuit."[2] The court found that the Department of Veterans Affairs (VA) waived its right to argue that the plaintiff "failed to timely exhaust the administrative remedies available to him," because the VA ruled on the merits of plaintiff's claims without addressing the issue of his failure to timely file his administrative complaint.[3] In *Ester*, the court applied this rule *only* to timeliness issues arising in the administrative process; the court did not address the timing requirements for filing a judicial complaint.[4]

The Facts of Ester

In January 1994, the VA notified Ester that it had selected a female applicant to fill a position he had applied for. After filing a timely informal complaint, Ester received written notice on 17 March 1994 that he had fifteen days to file a formal EEO complaint. Ester filed his formal complaint, however, on 19 April 1994—thirty-three days later.[5] The VA did not assert that the plaintiff's formal complaint was untimely during an initial and supplemental investigation. In fact, both investigative reports "specifically concluded that Ester had met all procedural requirements for filing a formal complaint."[6] On 29 January 1999, the VA rejected Ester's complaint on substantive grounds, without mentioning Ester's failure to timely file his formal complaint.[7]Ester subsequently filed a judicial complaint in the U.S. District Court for the Northern District of Illinois. The district court granted the VA's motion for summary judgment, on the grounds that Ester's failure to file his formal EEO complaint on time constituted failure to exhaust his administrative remedies.[8]

Analysis

The Court of Appeals for the Seventh Circuit could have issued a narrow rule—deciding that, on these facts, the VA was equitably estopped from raising the timeliness issue for the first time in district court. The court went further, however, and cre-

1. 250 F.3d 1068 (7th Cir. 2001).

2. *Id.* at 1072-73.

3. *Id.* The federal sector EEO rules found in 29 C.F.R. § 1614.105 require that persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap must consult an Equal Employment Opportunity counselor within forty-five days of the date of the matter alleged to be discriminatory. Section 1614.105 also provides that if the matter cannot be resolved, the counselor will provide written notice to the aggrieved person informing them that they have the right to file a formal discrimination complaint. 29 C.F.R. § 1614.105 (2001). Section 1614.106 provides that the aggrieved person must file the formal discrimination complaint within fifteen days of receipt of the notice from the counselor. *Id.* § 1614.106. Aggrieved persons who contact an EEO counselor or file their formal complaints after the prescribed time period are considered to have not exhausted their administrative remedies. The circuits have construed the administrative timeliness requirements as statutes of limitation that are subject to waiver, estoppel, and equitable tolling. *See, e.g*, Fitzgerald v. Henderson, 251 F.3d 345 (2d Cir. 2001); Jensen v. Frank, 912 F.2d 517 (1st Cir. 1990); Warren v. Dep't of the Army, 867 F.2d 1156 (8th Cir. 1989); Temengil v. Trust Territory of Pac. Islands, 881 F.2d 647 (9th Cir. 1989); Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987); Hornsby v. United States Postal Serv., 787 F.2d 87 (3d Cir. 1986); Henderson v. United States Veterans Admin., 790 F.2d 436 (5th Cir. 1986); Zografov v. Veterans Admin. Med. Ctr., 779 F.2d 967 (4th Cir. 1985); 766 F.2d 490 (11th Cir. 1985); Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984); Miller v. Marsh; Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982).

4. Federal law requires an aggrieved party to file a civil action within ninety days of receipt of the final administrative decision. 42 U.S.C. § 2000e-16(c) (2000). The Supreme Court has ruled, however, that the ninety-day statute of limitations is subject to the doctrine of equitable tolling. *See* Irwin v. Veterans Admin., 498 U.S. 89 (1990).

5. Ester's complaint alleged sexual discrimination, and retaliation for prior discrimination complaints. *Ester*, 250 F.3d at 1070.

6. *Id.*

7. *Id.* at 1071.

8. *Id.*

ated a clear standard on this issue: whenever an agency reaches the merits of an administrative complaint without preserving timeliness issues, the agency has waived a timeliness defense in a subsequent lawsuit.[9] The court's standard does not preclude an agency from deciding the merit of an untimely administrative complaint; the court merely requires the agency to find the complaint untimely before reaching a substantive decision.[10]

Practitioners, especially in the Seventh Circuit (Wisconsin, Illinois, and Indiana), must ensure that they raise timeliness issues early in the administrative process.[11] While *Ester* does not specify when the agency must raise timeliness issues, the agency should always raise or identify such issues at its first opportunity to address the complaint. Labor counselors must be vigilant to preserve timeliness issues during the administrative processing of complaints. In the Seventh Circuit, the Army must raise the issue before the installation, or the EEOC Complaints, Compliance, and Revision Agency, issues a final Army decision. Failure to raise a timeliness defense early may waive the Army's ability to raise this potentially dispositive issue in federal court.

The Court of Appeals for the Seventh Circuit decision in *Ester* may discourage federal agencies from investigating substantively meritorious discrimination claims. Its requirement that an agency raise any timeliness issue during the administrative process may unintentionally cause EEO counselors to focus only on the procedural aspects, rather than the merits, of the claims. The EEO counselor may then dismiss otherwise meritorious claims that deserve investigation.

The administrative process is designed to resolve claims at the lowest level, with a view towards doing the right thing. Whether the court's decision in *Ester* hurts or helps the system remains to be seen.

Explosive Detection Dogs Assistance to Civilian Law Enforcement Agencies

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After the 11 September 2001 tragedy and subsequent terrorist threats, civilian law enforcement agencies (CLEAs) are more sensitive to potential incidents involving explosive devices. The best tool available to determine whether a package or item is an explosive device is the Explosive Detection Dog (EDD), also known as the "bomb-dog." These dogs are similar to other "K-9" dogs, but receive extended training in searching for and locating explosive materials.[13] Unfortunately, most CLEAs cannot afford the expensive training, care, and maintenance of these dogs. Civil Law Enforcement Agencies located near a military installation, however, can request military EDD support.

The EDDs are a Department of Defense (DOD) asset; the Air Force is the executive agent for managing this program. The Army and the DOD monitor EDD use and deployment.[14] The DOD sends EDD teams throughout the United States for assignments, such as very important person (VIP) details, public event assistance, and emergency incident responses.[15]

The regulations and analysis applicable to EDD assistance differ from standard CLEA assistance or domestic operational support. In addition to the standard DOD instructions and

9. This was a question of first impression for the court. In reaching its decision, the Seventh Circuit specifically rejected the non-uniform results of circuits that had already addressed the issue. *Id.* at 1071. In *Rowe v. Sullivan*, the Fifth Circuit Court of Appeals required the agency to make an explicit finding of timeliness before it would find that the agency had waived timeliness as a defense. 967 F.2d 186, 191 (5th Cir. 1992). The Court of Appeals for the Ninth Circuit adopted a rule that when an agency makes a finding of discrimination, it waives the timeliness defense. *See* Boyd v. United States Postal Serv., 752 F.2d 410, 414 (9th Cir. 1985).

10. The Seventh Circuit did not reject the "well-settled rule that agencies do not waive a timeliness defense merely by accepting and investigating a discrimination complaint." *Id*. at 1072 n.1.

11. *Ester* has not yet been cited in other published Title VII cases, and *Ester* does not cite other cases to support its decision on the timeliness waiver. There is, however, an unpublished district court opinion from the Third Circuit that found that the "government waived its timeliness defense by failing to raise it in the administrative proceeding." Tinnin v. Danzig, No. CIV.A.99-1153, 2000 U.S. Dist. LEXIS 1392, at *1 (E.D. Pa. Feb. 4, 2000). In reaching this conclusion, the *Tinnin* court stated:

> We believe that the [EEOC's change at 29 C.F.R. § 1614.107(a)(2)] from "may" [dismiss] to "shall" [dismiss] is significant. The effect of the amended regulation is to have the tardiness issue raised and decided early and the claim brought to a prompt end if the plaintiff was in fact late, without the needless expenditure of time and money on the merits. The government should not be allowed to undercut the regulation by ignoring this defense at the administrative level and belatedly springing it on plaintiff for the first time in the district court. The government has waived its timeliness defense by failing to raise it in the administrative proceeding.

Id. at *9.

12. I want to thank Air Force Major Jeanne Meyer, International and Operational Department, The Judge Advocate General's School, for providing editorial guidance and suggestions for this article.

13. *See* U.S. DEP'T OF ARMY, REG. 190-12, MILITARY WORKING DOGS para. 4-6 (30 Oct. 1993) [hereinafter AR 190-12].

14. *Id*. para. 1-4.

Department of the Army regulations that establish rules for use of DOD and Army resources in support of CLEAs,[16] specific Army regulations define how EDD teams can be used for CLEA support.[17]

When analyzing a CLEA request for the use of military EDD support, judge advocates should address the following five areas: receipt of the request, authorization, reimbursement and indemnification, manner of response, and reporting requirements.

Receipt of the Request

Upon receipt of a request from a CLEA for the use of an EDD team, the judge advocate should ask two questions: why the CLEA needs the team, and whether the Posse Comitatus Act (PCA)[18] applies. The PCA prohibits direct assistance to CLEAs.[19] Direct assistance includes interdiction efforts, searches and seizures, arrests, apprehensions and "stop and frisks."[20] For example, a CLEA cannot use a military dog to locate a suspect hiding in a building, because use of military assets in a criminal search violates the PCA. Support missions to CLEAs that do not involve the dogs in direct law enforcement activities, however, are permissible. For these missions, the dogs are viewed as "equipment" and handlers viewed as "equipment operators."[21]

There are two categories of CLEA requests for EDD support: advance, and "immediate response."[22] Advance requests must be written. If necessary, a CLEA request for immediate response can be oral; however, the CLEA must submit a post-incident written request. All reports and requests for assistance forwarded to Headquarters, Department of the Army (HQDA), must include a written request.[23]

Authorization

If the incident requires an immediate response, the approval authority is the installation commander.[24] If there is not a requirement for an immediate response ((VIP) visits, support negotiated by a memorandum of agreement (MOA), and other advance requests), the approval authority is the Directorate of Military Support (DOMS).[25]

Reimbursement and Indemnification

Generally, CLEAs must reimburse the DOD when they receive equipment or services.[26] Requesting CLEAs must agree, as a condition for EDD response, to release the DOD from liability for acts committed by EDD teams and to reimburse the DOD for services rendered.

Historically, *Army Regulation 190-12* mandated the use of Department of Defense (DD) Form 1926 (Explosive Ordnance Disposal Civil Support Release and Reimbursement Agreement).[27] Although this form has been discontinued, judge advocates should use the principles behind DD Form 1926 when negotiating agreements with EDD-supported CLEAs. First, the agreement should place CLEAs on notice that responsibility and liability for U.S. Army EDD units responding to requests for assistance and for disposing of non-military explosives or chemicals remains with the requesting local authority.

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15. For example, EDD teams were used in response to the 1996 Oklahoma City bombing. *See* Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at nn.130-34 and accompanying text.

16. *See* U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVILIAN AUTHORITIES (18 Feb. 1997) [hereinafter DOD DIR. 3025.15]; U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986) [hereinafter DOD DIR. 5525.5]; U.S. DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT (1 July 1983) [hereinafter AR 500-51].

17. *See* AR 190-12, *supra* note 13.

18. 18 U.S.C. § 1385 (2000). The Act proscribes the use of military personnel in law enforcement activities within the boundaries of the United States. *See id*.

19. *See id*.

20. AR 500-51, *supra* note 16, para. 3-5.

21. *See Winthrop*, *supra* note 15, at nn.131-33 and accompanying text.

22. *See* DOD DIR. 3025.15, *supra* note 16, para. 4.7 (defining immediate response as "immediate action taken by the installation commander to save lives, prevent human suffering, or mitigate property damage under imminently serious conditions").

23. *Id*. para. 4.7.1.

24. AR 190-12, *supra* note 13, para. 4-7. This authority can be delegated to "any Component or Command." DOD DIR. 3025.15, *supra* note 16, para. 4.7.1.

25. *See* DOD DIR. 5525.5, *supra* note 16. *See also* AR 500-51, *supra* note 16, para. 1-8.

26. DOD DIR. 5525.5, *supra* note 16, para. E5.2.1.

27. AR 190-12, *supra* note 13, para. 4-7c(2).

Second, the agreement should release the Army from liability for personal injuries, collateral property damages, and the like, which may occur during EDD services. These measures reduce or eliminate the scope of the Army's potential liability for damages. Finally, the contract should bind the requesting local authority to indemnify the Army for any liability resulting from the request.

To cover release and reimbursement across the scope of potential EDD requests, judge advocates should incorporate the above principles into three methods. The first method is to execute annual MOAs with CLEAs, located within the immediate vicinity of the installation, that frequently request EDDs.[28] These MOAs should establish the terms for immediate responses only—not advance requests, such as VIP visits. The second method is execution of MOAs for advance requests. These agreements will involve seeking authorization from HQDA. The third method is for an emergency response without a pre-established MOA. In this situation, the requesting agency orally agrees to the terms of the agreement. As soon after the incident as possible, the installation's provost marshal should execute the written agreement with the serviced CLEA. The executed agreement then accompanies the incident report to the DOMS.

If a CLEA requests non-reimbursable support, it must provide a legal and factual justification for a waiver of reimbursement.[29] The installation commander cannot waive reimbursement; he must forward the waiver request from the CLEA to DOMS. The only grounds for waiving reimbursement are that:

> [(1) The assistance i]s provided incidental to an activity that is conducted for military purposes.
>
> [(2) The assistance i]nvolves the use of DOD personnel in an activity that provides DOD training operational benefits that are substantially equivalent to the benefit of DOD training or operations.[30]

Response

Army Regulation 190-12 implements the principles of the PCA. Explosive Detection Dog handlers and spotters can provide assistance only while "unarmed and [without distinctive military police] accessories (badge, brassard, lanyard, handcuffs, [utility belt, baton])."[31] An agent of the CLEA, furthermore, must always accompany the EDD team.[32] The key is that EDD handlers respond as equipment operators, not as law enforcement officials.

While engaging in explosive detection assistance, military EDD handlers and their dogs may only use the team's "searching and detecting capabilities."[33] The team cannot "track and search a building or area for, and/or detect, pursue, and hold, an intruder or offender suspect."[34]

Once the EDD responds to a potentially explosive device, the handler should withdraw and allow the CLEA representative to handle the situation.[35]

Reporting

The type of response determines the type of report required. In immediate response cases, the incident must be reported to the DOMS. The installation commander (or his delegate) follows up on the initial report immediately after the incident. If possible, the report should include a copy of the request from the CLEA and the MOA.[36] When the installation commander receives prior authorization from DOMS to provide EDD support to a CLEA (through a MOA), he includes the incident in the quarterly report on installation support to CLEAs.[37]

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28. Judge advocates should coordinate with the installation's Directorate of Resource Management for the execution of these MOAs.

29. DOD DIR. 3025.15, *supra* note 16, para. 4.12.

30. DOD DIR. 5525.5, *supra* note 16, para. E5.2.2. These are grounds for waiver only if "reimbursement is not otherwise required by law." *Id.*

31. AR 190-12, *supra* note 13, para. 4-7c(6).

32. *Id*. para. 4-7c(8).

33. *Id*. para. 4-7c(7).

34. *Id.*

35. *See id*. para. 4-7c(8).

36. The DOMS can be contacted at (703) 697-1096/695-2003; fascimile: (703) 697-3147; address: Directorate of Military Support; 400 Army Pentagon; Room BF762, Pentagon; Washington, D.C. 20310.

37. AR 500-51, *supra* note 16, para. 1-5.

Conclusion

When advising commanders on issues involving domestic operations, judge advocates must match the facts to the applicable statutes and regulations. Proper analysis of CLEA requests for EDD teams is crucial, because the clear lines established by the PCA can easily become blurred or completely disappear. By following the above steps, the Army can provide effective, safe, and proper CLEA assistance.

Appendix: Explosive Detection Dog

Civil Support Release and Reimbursement Agreement

AGREEMENT BETWEEN

[INSTALLATION]

AND

REQUESTING AGENCY OR CIVIL AUTHORITY: _____

In the event that the United States, through the Department of the Army and [INSTALLATION], begins explosive detection dog (EDD) procedures

upon (*type device*) _____

located at (*street, location/city/state*) _____

then, in consideration therefore, and in recognition of the peculiar hazards involved in the detection of non-military commercial-type explosives, chemicals, or similar dangerous articles, (*requesting agency or civil authority*)

_____(hereinafter, referred to as Requestor) agrees:

1. To reimburse the Department of the Army for the costs involved in furnishing all requested EDD services. Such costs may include personal services of civilian employees, travel and per diem expenses for military and civilian personnel, and other expenses to include transportation and supplies, materiel, and equipment with prescribed noncommercial charges; costs of consumed supplies, materiel, and equipment and such supplies, materiel, and equipment which is damaged beyond economical repair; and costs of repairing or reconditioning nonconsumable items not damaged beyond economical repair.

2. To consider all military and civilian personnel of the United States and the Department of the Army involved in furnishing requested EDD services as its own agents or servants.

3. To hold the United States and the Department of the Army and all military and civilian personnel of the Department of the Army harmless for any consequences of services rendered pursuant to this agreement without regard to whether the services are performed properly or negligently. (*This paragraph is inapplicable if the Requestor is the United States Government or one of its instrumentalities*).

4. To indemnify the United States and the Department of the Army and all military and civilian personnel of the Department of the Army for any costs incurred as a result of any claims or civil actions brought by any third person as a result of the services requested, even though negligently performed, and to pay all costs of settlement or litigation.

5. To file no claim for administrative settlement with any Federal agency nor to institute any action or suit for money damages in any court of the United States or any State for injury to or loss of property or for personal injury or death caused by the negligence or wrongful act or omission of any military or civilian employee of the United States or the Department of the Army while such employee is engaged in rendering EDD services pursuant to this agreement.

_____

AUTHORIZED REPRESENTATIVE OF REQUESTOR

_____

AUTHORIZED REPRESENTATIVE OF [INSTALLATION]

_____

DATE

Litigation Division Note

Responding to Freedom of Information Act (FOIA) Requests for Contractor Post-Performance Evaluations

Introduction

Under the Competition in Contracting Act of 1984 (CICA),[1] a contractor must be "responsible" to compete for a government contract.[2] One of the factors agencies consider when determining a contractor's responsibility is its performance record.[3] Accordingly, the Federal Acquisition Regulation (FAR)[4] requires agencies to record and maintain contractor performance information to use as source selection information for future procurements.[5]

The agency tailors the content and format of these reports "to the size, content, and complexity of the contractual requirements."[6] The reports "generally provide for input . . . from the technical office, contracting office, and . . . end users of the product or service."[7] In addition to objective data, they contain potentially subjective matter, such as the evaluator's ratings and written comments.[8]

Contracting officers may receive requests for these evaluations from a contractor's competitors and other members of the public under the FOIA.[9] In response, agencies routinely assert the Procurement Integrity Act (PIA)[10] as an authority for withholding source selection information under FOIA exemption (b)(3) (Exemption 3).[11] This basis, however, might not be defensible in litigation. This note recommends two privileges under FOIA's exemption (b)(5) (Exemption 5) that agencies should examine when responding to requests for contractor post-performance evaluations: confidential commercial information generated by the government and deliberative process material.[12]

The FAR Requires Contract Performance Evaluations

The obligation to prepare a performance evaluation depends on the type and dollar amount of the contract. For all "contracts [over] $1,000,000 (regardless of the date of contract

1. Competition in Contracting Act of 1984, Pub. L. No. 98-369, Div. B, Title VII, 98 Stat. 1175 (1984) (codified as amended in scattered sections of 31 U.S.C. and 41 U.S.C.) [hereinafter CICA].

2. *See* 41 U.S.C. § 403(6)-(7) (2000); 48 C.F.R. § 9.103(b) (2001) ("No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.").

3. *See* 41 U.S.C. § 403(7)(c); 48 C.F.R. § 9.104-1(c) ("To be determined responsible, a prospective contractor must . . . have a satisfactory performance record."); *id.* § 9.104-3(b).

4. 48 C.F.R. §§ 42.1500-.1503.

5. *Id.* § 42.1503(b).

6. *Id.* § 42.1502(a).

7. *Id.* § 42.1503(a).

8. *See* General Servs. Admin., Standard Form 1420: Performance Evaluation – Construction Contracts (Oct. 1983), *available at* http://www.deskbook.osd.mil/appfiles/RLIB0072.pdf.

9. 5 U.S.C. § 552 (2000).

10. 41 U.S.C. § 423 (2000).

11. 5 U.S.C. § 552(b)(3). Exemption 3 permits withholding of records when:

> specifically exempted from disclosure by statute (other than 5 U.S.C. § 552a), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Id.

12. *Id.* § 552(b)(5). Exemption 5 permits withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *Id.*

award) and each contract in excess of $100,000 beginning not later than 1 January 1998," agencies must prepare contractor performance evaluations on completion of the contracted work.[13] The FAR also requires performance evaluations at the completion of every government construction project of "$500,000 or more; or [m]ore than $10,000 if the contract was terminated for default,"[14] and for architect-engineer contracts that exceed $25,000.[15]

All post-performance evaluations may be used as source selection information for any federal agency procurement within three years of the completion of contract performance.[16] The principal purpose for making and collecting the performance evaluations is to ensure that all prospective contractors are responsible before they are awarded a government contract.[17] Upon request, all federal government departments and agencies may share these evaluations to support future award decisions.[18]

The FAR Requires Agencies to Withhold Reports as "Source Selection Information"

During the three-year period of potential use as source selection information, the FAR prohibits release of the reports to any party "other than Government personnel and the contractor whose performance is being evaluated."[19] The rationale is expressly set forth: "Disclosure . . . could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations."[20] The FAR provisions, however, are subject to the statutory disclosure obligations imposed by the FOIA.[21] Except for specific exemptions, the FOIA generally provides public access to federal agency records.[22]

Consequently, contracting officials may not withhold post-performance evaluations from a FOIA requester based solely upon the dictates of the FAR. To withhold a report or portion thereof, contracting personnel must properly assert an applicable FOIA exemption.

FOIA Exemption 3 and the Procurement Integrity Act

The PIA is a statutory prohibition upon disclosing procurement information, including source selection information, "before the award of a [public] contract to which the information relates."[23] A 1996 amendment, however, contains a savings clause that arguably subordinates the PIA to the FOIA.[24] There are no published cases which determine that the PIA is a valid FOIA Exemption 3 withholding statute.[25] Because the PIA is not a firmly established withholding statute,[26] components of the Department of Defense that seek to withhold post-performance evaluations should consider other applicable FOIA exemptions for justification.

13. 48 C.F.R. § 42.1502(a) (2001). Contracts performed by Federal Prison Industries, Inc. or by people who are blind or severely disabled are exempt from performance evaluation. *See id.* § 42.1502(b).

14. *Id.* § 36.201(a).

15. *Id.* § 36.604(a). Agencies may also conduct post-performance evaluations of architect-engineer contracts under $25,000. *Id.*

16. *Id.* § 42.1503(d)-(e).

17. *See id.* §§ 9.104-3(b), 42.1501.

18. *Id.* § 42.1503(c).

19. *Id.* § 42.1503(b).

20. *Id.*

21. *Id.* § 9.105-3(a) ("Except as provided in [the] Freedom of Information Act, information . . . accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government."). *Id.*

22. *See* 5 U.S.C. § 552(a)-(b) (2000).

23. 41 U.S.C. § 423(a) (2000).

24. *See id.* § 423(h)(7). The PIA is subject to "*any requirements* . . . established under *any other law* or regulation." *Id.* (emphasis added).

25. The Department of Defense (DOD) Directorate for Freedom of Information and Security Review (DFOISR) publishes a list of statutes commonly used within the DOD determined valid Exemption 3 statutes through litigation. Memorandum, H. J. McIntyre, Director, DFOISR, (Mar. 3, 2001) (on file with DFOISR). *But see* Legal and Safety Employee Research, Inc. v. United States Dep't of the Army, No. 00-1748 (E.D. Cal. May 7, 2001).

26. A statute should be considered "firmly established" as an Exemption 3 withholding statute when litigation has established that the statue either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). *See, e.g.*, Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989).

Even if the PIA qualified as an Exemption 3 statute, it probably would not encompass post-performance evaluations. The PIA's specific categories of "source selection information" do not include performance evaluations.[27] The catchall definition of source selection information covers material marked on a case-by-case basis as source selection information, but it also fails to embrace these evaluations.[28] The FAR does not direct any case-by-case determinations or provide any criteria for making them. Indeed, such directions would be contrary to the FAR mandate for collecting and sharing performance evaluations.[29]

It will likely require a legislative amendment to the PIA for post-performance evaluation reports to fall conclusively under Exemption 3. The PIA will be firmly established as an Exemption 3 withholding statute only when it is clear that the savings clause in the 1996 amendment does not subordinate the statute to the FOIA. Congress should also amend the definition section of the PIA to include post-performance evaluation reports as source selection information. Until then, Exemption 3 and the PIA do not provide a sound legal basis for withholding post-performance evaluations.

FOIA Exemption 5 as a Basis for Withholding Post-Performance Evaluations

Exemption 5 might succeed where Exemption 3 apparently fails in justifying the withholding of post-performance evaluations.[30] Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[31] The language of Exemption 5 covers all documents not routinely discoverable in litigation with the agency.[32] Contracting officers should consider the Exemption 5 privileges afforded to confidential commercial information and to deliberative inter-agency or intra-agency internal memorandums, as discussed in the following sections.

Confidential Commercial Information - The Merrill *Privilege*

In *Federal Open Market Committee of the Federal Reserve System v. Merrill*, the Supreme Court ruled that Exemption 5 incorporated a qualified privilege for confidential commercial information when the "information is generated by the Government itself in the process leading up to awarding a contract."[33] It explicitly recognized an Exemption 5 privilege in the context of a government procurement program.[34]

The Court applied a two-pronged test to determine if Exemption 5 applied to the information the government sought to withhold under the FOIA. The first prong was whether the documents were confidential commercial information. The second prong was whether the documents would be privileged in civil discovery.[35]

The Court first determined that the documents were commercial information, describing them as "substantially similar to confidential commercial information generated in the process of awarding a contract."[36] Then it found that the documents would be protected in civil discovery, observing that "the sensitivity of the secrets involved and the harm that would be inflicted upon the government by premature disclosure should serve as relevant criteria in determining the applicability of the Exemption 5 privilege."[37]

In *Morrison-Knudsen Co. v. Department of Army*, the District Court for the District of Columbia[38] applied this analysis to documents the government used to formulate its own bid in the

27. *See* 41 U.S.C. § 423 (f)(2)(A)-(I). In the context of a pending procurement, post-performance evaluations could arguably fall under one of the specific definitions if incorporated into the evaluation of proposals. *See id*.

28. *See id.* § 423 (f)(2)(J). Subparagraph (J) is the catchall provision: "other information marked as 'source selection information' based on a case-by-case determination by the head of the agency, his designees, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates." *Id.*

29. 48 C.F.R. § 42.1503(b)-(c) (2001).

30. In addition to the two FOIA Exemption 5 privileges discussed in this note, other FOIA exemptions may apply to a particular record. These include, but are not limited to, exemptions for classified information, contractor trade secrets and commercial information, and Privacy Act material. *See* 5 U.S.C. § 552(b)(1), (3), (4).

31. *Id.* § 552(b)(5).

32. Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975).

33. 443 U.S. 340, 360 (1979).

34. *Id.*

35. *Id.* at 361.

36. *Id.*

37. *Id.* at 363.

A-76 procurement process.[39] The court found that because the government relied on the documents in formulating its bid, the documents were commercial information created by the government for purposes relating to the federal procurement process. After examining evidence of the government's intent to withhold the information from other potential contractors and the public, the court deemed the information to be confidential as well.[40] The court considered whether the documents contained sensitive commercial information, not otherwise available, which would significantly harm the A-76 program if released before the submission of bids.[41] It found that the documents would enable an informed bidder to approximate a winning bid price more accurately than would be otherwise possible using generally available data and the information released with the bid solicitation.[42]

Contractor Post-Performance Evaluation Reports Are Confidential Commercial Information

Merrill[43] and its progeny establish the test for determining the confidentiality of commercial information. Although there is a dearth of case law addressing the applicability of these privileges to post-performance evaluations used as source selection information, the evaluations appear to easily satisfy all requirements of the two-prong *Merrill* test.

Under the first prong, information must satisfy three elements. The post-performance evaluations must be "confidential," "commercial information," and "generated by the government."[44] Federal Acquisition Regulation subpart 42.15 provides the necessary information to answer each element of this prong. Subpart 42.15 states that "[t]he completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated."[45] Therefore, the evaluations are confidential. This FAR provision also designates post-performance evaluations as source selection information for use in government procurements, so the evaluations are commercial information as well.[46] Finally, subpart 42.15 confirms that the government generates the evaluations.[47]

The second prong of the *Merrill* test is whether the documents would be privileged in civil discovery.[48] Under Federal Rule of Civil Procedure 26(c)(7), "a trade secret or other confidential research, development, or commercial information" can be protected from discovery in litigation.[49] In the procurement context, "[t]he theory behind a privilege for confidential commercial information generated in the process of awarding a [government] contract . . . is . . . that the Government will be placed at a competitive disadvantage or that consummation of the contract may be endangered."[50]

Again, the FAR provides the applicable information. Subpart 42.15 expressly provides that disclosure of the evaluations "could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations."[51] This is consistent with the analysis required by *Merrill*,[52] and suggests that the FAR Council may have been

38. A FOIA suit may be brought in the district where the complainant resides, the district where the agency records are located, and the District of Columbia. 5 U.S.C. § 552(a)(4)(B) (2000).

39. 595 F. Supp. 352, 354 (D.D.C. 1984), *aff'd*, 762 F.2d 138 (D.C. Cir. 1985). These documents related to manpower distribution by staffing and workload, staffing of functions and salary costs, required maintenance cost estimates, employee and cost data, and a table of maintenance requirements performed in-house, contracted out, and left undone. *Id.* at 353 n.3. *See generally* FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983, Revised 1999).

40. *Morrison-Knudsen*, 595 F. Supp. at 353-55.

41. *Id.* at 356.

42. *Id.* at 355.

43. Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340 (1979).

44. *See Merrill*, 443 U.S. at 360.

45. 48 C.F.R. § 42.1503(b) (2001).

46. *Id.*

47. *Id.* § 42.1502(a) (stating that agencies generate the evaluations).

48. *See Merrill*, 443 U.S. at 361.

49. FED. R. CIV. P. 26(c)(7).

50. *Merrill*, 443 U.S. at 360.

51. 48 C.F.R. § 42.1503(b).

mindful of FOIA Exemption 5 and the *Merrill* test when drafting subpart 42.15.

In the broadest sense, the harm to the government is the danger that disclosure will significantly reduce competition. Public availability of the contractor post-performance evaluations obfuscates the document's original significance (and the government's purpose for generating the evaluations) and greatly increases the risk of detrimental usage. The most obvious of these risks is the potential competitor's use of the evaluation against the contractor in the contract award process.

To appreciate the potential harm to the government, one must recognize the contractor's point of view. Contractors who do not want their post-performance evaluations freely disseminated might discontinue bidding on government contracts. Reduced competition hurts the government procurement process because it tends to raise contract prices and reduce quality and innovation. Recognizing this, Congress passed the CICA in 1984 to ensure competition in government contracting to the maximum extent practicable.[53]

The Evaluations May Also Qualify Under the "Deliberative Process" Privilege

Contracting officials seeking to withhold information may also consider Exemption 5's deliberative process privilege. This exemption protects the government's internal consultative process by preserving the confidentiality of opinions, recommendations, and deliberations underlying government decisions and policies.[54] The broad scope of the privilege encourages agency employees to express their opinions frankly, without the inhibiting fear of publicity. It also protects against public confusion resulting from the disclosure of communications that help shape an agency action, but actually are not the basis for the final action.[55]

As the Supreme Court stated, the ultimate purpose of the Exemption 5 deliberative process privilege is to "prevent injury to the quality of agency decisions."[56] While the privilege undoubtedly protects the policy formation process, its overarching purpose is to protect the integrity of the decision-making process by ensuring that agency officials do not operate "in a fishbowl."[57] The privilege exists in part to prevent disclosure from discouraging candid discussion within the agency.[58]

To properly invoke the Exemption 5 deliberative process privilege, the agency must show that the protected communication is pre-decisional—"[a]ntecedent to the adoption of an agency policy,"[59] and deliberative—recommendations or opinions on "legal or policy matters."[60] The privilege is not limited to agency policies, but also covers agency decisions that are not necessarily policy matters. The Supreme Court has stated that the privilege exempts "materials reflecting deliberative *or* policy-making processes . . . ."[61] In addition, the privilege covers "materials reflecting the advisory and consultative process by which decisions *and* policies are formulated."[62]

Every court of appeals that has considered the issue has expressly rejected the argument that the privilege is limited to policy decisions. In *Providence Journal Co. v. Department of the Army*, the Court of Appeals for the First Circuit reversed a district court opinion that held that an Inspector General report did not fall within the deliberative process privilege.[63] The district court had stated that it was not a deliberative policy-making document" because it concerned the discipline of specified individuals rather than general disciplinary issues.[64] The appel-

52. *See Merrill*, 443 U.S. at 361-63.

53. *See* CICA, *supra* note 1. *See also* Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2304-2305 (2000); Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 253-253(a) (2000); Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401-424 (2000).

54. *See* Jordan v. United States Dep't of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978) (en banc).

55. *See* Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984); Russell v. United States Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

56. Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

57. EPA v. Mink, 410 U.S. 73, 87 (1972) (quoting S. REP. NO. 89-813, at 9 (1965)).

58. Access Reports v. United States Dep't of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991).

59. *Jordan*, 591 F.2d at 774.

60. *Id.*

61. *Mink*, 410 U.S. at 89 (emphasis added). *See also id.* at 87 (referring to "legal or policy matters").

62. The Army Times Publ'g Co. v. United States Dep't of the Air Force, No. 91-5395, slip op. at 5 (D.C. Cir. 1993) (emphasis added). *See also Access Reports*, 926 F.2d at 1194; Wolfe v. United States Dep't of Health & Human Servs., 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc).

63. 981 F.2d 552 (1st Cir. 1992).

late court rejected this approach, stating that this "deliberative task is no less an agency function than the formulation or promulgation of agency disciplinary policy."[65] The court found no authority for the distinction between reports discussing general policy matters and those involving investigations of specific individuals.[66] It held that "the appropriate judicial inquiry is whether the agency document was prepared to facilitate and inform a final decision or deliberative function entrusted to the agency."[67]

Similarly, in *National Wildlife Federation v. United States Forest Service*,[68] the Court of Appeals for the Ninth Circuit expressly rejected the plaintiff's argument that "opinions and recommendations regarding facts or consequences of facts," as opposed to policy recommendations, do not fall within the deliberative process privilege.[69] The court found no requirement for a document to contain recommendations on law or policy to be "deliberative" for purposes of Exemption 5.[70]

Congress specifically intended for Exemption 5 to protect internal agency deliberations, thereby ensuring the "full and frank exchange of opinions" within an agency.[71] Congress noted that an agency cannot always operate effectively if required to disclose documents or information which it received or generated before it "completes *the process of awarding a contract* or issuing an order, decision, or regulation . . . ."[72] Taken together, the "full and frank exchange of opinions" language and the express intent to protect against pre-award disclosure of information reflects that Congress considered the deliberative process privilege to apply to the awarding of government contracts.

When the Supreme Court confirmed that a specific qualified privilege exists for commercial information in the context of government contracting, the theory focused upon the competitive disadvantage to the government.[73] Although *Merrill* distinguished the confidential commercial information privilege, the Court did not render this privilege mutually exclusive from the deliberative process privilege. Therefore, confidential commercial information of the government that is also deliberative and pre-decisional should also be evaluated under the deliberative process privilege of Exemption 5.

Contractor Performance Evaluations Are Pre-Decisional and Deliberative

Contractor performance evaluations might be viewed as post-decisional because they are prepared upon the conclusion of a government contract. They are, however, more appropriately characterized as pre-decisional documents because the evaluation's primary purpose is to support future government procurements. The post-performance evaluations are prepared in accordance with the FAR and implement the CICA mandate to determine contractor responsibility through the evaluation of past performance records.[74]

Contractor performance evaluations may vary in form and content, depending upon the nature of the contract and the agency requirements.[75] Nonetheless, they are all deliberative documents. Performance evaluations contain value judgments regarding contractor's performance. The evaluations normally include an evaluator's opinions, conclusions, and recommendations concerning the contractor's performance.[76] They are a necessary part of the process for making decisions regarding contractor responsibility for future procurements.[77]

64. *Id*. at 559-60.

65. *Id*.

66. *Id*.

67. *Id*.

68. 861 F.2d 1114 (9th Cir. 1988).

69. *Id*. at 1118-20.

70. *Id*. at 1118.

71. Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 359 (1979) (quoting H.R. REP. NO. 89-1497, at 10 (1966)).

72. *Id*. (emphasis added).

73. *See id*. at 360.

74. *See* 41 U.S.C. § 403(6)-(7) (2000); 48 C.F.R. § 9.103(b) (2001).

75. *See* 48 C.F.R. § 42.1502(a).

76. *See supra* notes 7-8 and accompanying text.

77. *See* 41 U.S.C. § 403(6)-(7); 48 C.F.R. § 9.103(b).

Additional FOIA Considerations - Segregate Releasable Portions and Apply the "Foreseeable Harm" Standard

After identifying any applicable exemptions, the FOIA requires agency officials to release "any reasonably segregable portion of a record."[78] An entire record may be withheld only if the agency determines that the non-exempt material is so "inextricably intertwined" with the exempt material that the released portion would only be "essentially meaningless words and phrases."[79] In the context of deliberative material, the distinction between fact and deliberation is not always clear; the process of deciding what facts belong in a report can be an exercise of judgment that renders the facts themselves exempt.[80] Consequently, contracting officers should seek help from their legal advisors.

The Department of Justice no longer encourages the discretionary release of exempt material based on a foreseeable harm analysis.[81] Although the new FOIA guidance does not affirmatively discourage discretionary releases, it emphasizes the Administration's commitment to protecting agency deliberations and sensitive business information.[82]

The FAR drafters decided that agencies cannot keep post-performance evaluations as source selection information for longer than three years after contract performance.[83] Presumably, this is because release of the evaluations carries less risk to the procurement process as the information grows older. Because the evaluations must lose their "source selection information" status after three years, it will be more difficult to justify withholding them afterwards as confidential commerical information or pre-decisional material. On the other hand, an earlier discretionary release remains a possibility in the right circumstances.

Conclusion

The PIA will remain a questionable basis for withholding contractor performance evaluations under FOIA Exemption 3 unless it becomes firmly established as a qualifying statue and defines the evaluations as source selection information. When responding to a FOIA request for contractor post-performance evaluations, an agency contemplating withholding the information should consider the Exemption 5 privileges extended to the government's confidential commercial information and deliberative material. Freedom of Information Act officials and their legal advisors should remain mindful of the duty to segregate releasable materials, as well as the recent Department of Justice guidance on discretionary release. Knowledgeable legal advisors can offer valuable assistance to contracting officers and FOIA officers who must navigate this system of exemptions and obligations. Major Scott Reid.

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78. 5 U.S.C. § 552(b) (2000). "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." *Id.*

79. *See, e.g.*, Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981).

80. Montrose Chem. Co. v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974). *See generally* U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT 247-52 (2000).

81. Memorandum from the Att'y Gen., to Heads of all Federal Departments and Agencies, subject: The Freedom of Information Act (15 Oct. 2001) [hereinafter FOIA memo, 15 Oct. 2001] (regarding the FOIA), *available at* http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm. The memorandum advises agencies to make a discretionary release of exempt material "only after full and deliberate consideration of the institutional, commerical, and personal privacy interests that could be implicated by disclosure of the information." *Id.* The new policy supercedes the previous October 1993 policy statement that encouraged discretionary release. Memorandum from the Att'y Gen., to Heads of Departments and Agencies, subject: The Freedom of Information Act (4 Oct. 1993) (regarding the FOIA), *available at* http://www.fas.org/sgp/clinton/reno.html.

82. *See* FOIA memo, 15 Oct. 2001, *supra* note 81.

83. *See* 48 C.F.R. § 42.1503(e).

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2001

November 2001

5-8 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).

December 2001

3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-12 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
10-14 December	4th Fiscal Law Comptroller Accreditation Course—Hawaii (**Tentative**) (5F-F14).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
6-18 January	2002 JAOAC (Phase II) (5F-F55).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
14-18 January	2002 USAREUR Tax CLE (5F-F28E).
23-25 January	8th RC General Officers Legal Orientation Course (5F-F3).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
3-8 February	2002 USAREUR Operational Law CLE (5F-F47E).
4-8 February	2nd Closed Mask Training (512-27DC3).

4-8 February	77th Law of War Workshop (5F-F42).
11-14 February	2002 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).
25 February-26 April	7th Court Reporter Course (512-27DC5).
28 January 8 February	4th Voice Recognition Training (512-27DC4).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
11-15 March	26th Administrative Law for Military Installations Course (5F-F24).
18-22 March	4th Contract Litigation Course (5F-F103).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	1st Domestic Operations Seminar.
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Legal NCOs Course (512-27D/20/30).
22-26 April	2002 Combined WWCLE (5F-2002).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

6-10 May	3rd Closed Mask Training (512-27DC3).
13-17 May	5th Intelligence Law Workshop (5F-F41).
13-17 May	50th Legal Assistance Course (5F-F23).
29-31 May	Professional Recruiting Training Seminar.

June 2002

3-5 June	5th Procurement Fraud Course (5F-F101).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	5th Voice Recognition Training (512-27DC4).
3 June-28 June	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-12 June	5th Team Leadership Seminar (5F-F52S).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-27D/40/50).
17-21 June	6th Chief Legal NCO Course 512-27D-CLNCO).
24-26 June	Career Services Directors Conference.
24-28 June	13th Legal Administrators Course (7A-550A1).
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-12 July	33d Methods of Instruction Course (5F-F70).
8-26 July	3d JA Warrant Officer Advanced Course (7A-550A0).
15-19 July	78th Law of War Workshop (5F-F42).

15 July- 2 August	MCSE Boot Camp.
15 July- 13 September	8th Court Reporter Course (512-27DC5).
29 July- 9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August- 22 May 03	51st Graduate Course (5-27-C22).
12-23 August	38th Operational Law Seminar (5F-F47).
26-30 August	8th Military Justice Managers Course (5F-F31).

September 2002

9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
23-27 September	3rd Court Reporting Symposium (512-27DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).

3. Civilian-Sponsored CLE Courses

7 December ICLE	Trial Tactics from a Master Marriott Century Center Hotel Atlanta, Georgia
21 December ICLE	Labor and Employment Law Swissotel Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	31 December, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter

	triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the September/ October 2001 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2002***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 Ocotber 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRNG SITE/HOST UNIT	COURSE NUMBER*	CLASS NUMBER	SUBJECT	ACTION OFFICER
17-18 Nov 01	New York, NY 77th RSC	JA0-21 JA0-41	929 922	Administrative Law (Claims, Legal Assistance); International and Operational Law	MAJ Isolina Esposito (718) 352-5654
18-20 Nov 01	Alexandria, VA			LSO Commanders/RSC SJAs Workshop	
5-6 Jan 02	Long Beach, CA 63rd RSC	JA0-41 JA0-21	924 930	Operational Law; Operations other than War; Administrative Law (Legal Assistance)	CPT Paul McBride (760) 634-3829 ncsdlaw@pacbell.net
2-3 Feb 02	Seattle, WA 70th RSC/WAARNG	JA0-21 JA0-31	931 924	Administrative Law (Legal Assistance); Criminal Law	LTC Greg Fehlings (206) 553-2315 Gregory.e.fehlings@usdoj.gov
8-10 Feb 02	Columbus, OH 9th LSO	JA0-41 JA0-21	926 932	Operational Law; Law of War; Administrative Law	SSG Lamont Gilliam (614) 693-9500
16-17 Feb 02	Indianapolis, IN INARNG	JA0-31 JA0-21	926 933	Criminal Law; Administrative Law	LTC George Thompson (317) 247-3491 George.Thompson@in.ngb.army.mil
23-24 Feb 02	West Palm Beach, FL 174th LSO/FLARNG	JA0-31 JA0-41	925 925	Criminal Law (Administrative Separation Boards); Operational/Deployment Law; Ethics Tape	LTC John Copelan (305) 779-4022 john.copelan@se.usar.army.mil
2-3 Mar 02	Denver, CO 96th RSC/87th LSO	JA0-21 JA0-31	934 927	Administrative Law (Legal Assistance/Claims)); Criminal Law	LTC Vince Felletter (970) 244-1677 vfellett@co.mesa.co.us
9-10 Mar 02	Washington, DC 10th LSO	JA0-41 JA0-11	927 920	Operational Law; Contract Law	CPT James Szymalak (703) 588-6750 James.Szymalak@hqda.army.mil
9-10 Mar 02	San Mateo, CA 63rd RSC/75th LSO	JA0-41 JA0-11	928 921	International Law (Information Law); Contract Law; Ethics Tape	MAJ Adrian Driscoll (415) 274-6329 adriscoll@ropers.com
16-17 Mar 02	Chicago, IL 91st LSO	JA0-21 JA0-11	935 924	Administrative Law (Claims); Contract Law	MAJ Richard Murphy (309) 782-8422 DSN 793-8422 murphysr@osc.army.mil
12-14 Apr 02	Kansas City, MO 8th LSO/89th RSC	JA0-21 JA0-11	936 922	Administrative/Civil Law; Contract Law	MAJ Joseph DeWoskin (816) 363-5466 jdewoskin@cwbbh.com SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
22-26 Apr 02	Charlottesville, VA OTJAG	5F-2002	002	Spring Worldwide CLE	
19-21 Apr 02	Austin, TX 1st LSO	JA0-31 JA0-21	929 937	Criminal Law; Administrative Law	MAJ Randall Fluke (903) 868-9454 Randall.Fluke@usdoj.gov

27-28 Apr 02	Newport, RI 94th RSC	JA0-31 JA0-11	930 923	Military Justice; Contract/Fiscal Law	MAJ Jerry Hunter (978) 796-2140 Jerry.Hunter@usarc-emh2.army.mil
4-5 May 02	Gulf Shores, AL 81st RSC/ALARNG	JA0-31 JA0-21	928 938	Criminal Law (Administrative Separation Boards); Administrative Law (Legal Assistance); Ethics Tape	MAJ Carrie Chaplin (205) 795-1516 carrie.chaplin@se.usar.army.mil

***** Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available through the DTIC, see the September/October 2001 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the September/October 2001 issue of *The Army Lawyer.*

4. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users, who have been approved by the LAAWS XXI Office and senior OTJAG staff.

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads "Enter JAGCNet."

(b) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "password" in the appropriate fields.

(c) If you have a JAGCNet account, *but do not know your user name and/or Internet password,* contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(d) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(e) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process.‘ Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(f) Once granted access to JAGCNet, follow step (b), above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the September/October 2001 issue of *The Army Lawyer*.

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Win-

dows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's Web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

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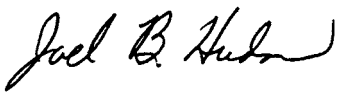

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